86-991

Supreme Court, U.S.
FILED
JUN 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

SYBIL JAMIESON COOMBS, PETITIONER
(Natural Mother of CHRISTOPHER J.)

MAINE DEPARTMENT OF HUMAN SERVICES

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES
FROM THE MAINE SUPREME JUDICIAL COURT

PETITION FOR CERTIORARI

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1. QUESTIONS PRESENTED

Does the Due Process Clause of the 14th Amendment to the United States Constitution require a State to show parental unfitness by clear and convincing evidence in order to terminate parental rights?

Should a substantive due process standard for parental unfitness require, as a constitutional minimum, that the unfitness be the fault of, or be caused or created by the parent?

Does the Due Process Clause of the 14th Amendment to the United States Constitution require the State to show reunification efforts in compliance with State law, by clear and convincing evidence, in order to terminate parental rights, if that failure to make such efforts leads to the conclusion of the State court that termination was in the best interests of the child?

Does the Due Process Clause of the 14th Amendment to the United States Constitution allow for the termination of parental rights based solely on a showing, by clear and convincing evidence, that such termination is in the best interests of the child?

Does the Termination of Parental Rights Statute of the State of Maine, Title 22 M.R.S.A. Section 4055, as applied by the Maine Supreme Judicial Court in the instant case, violate the Due Process Clause of the 14th Amendment of the Constitution of the United States?

In the case of State statute requiring either the objection or the consent of a 14 year old to termination of his natural parents' rights, or to his adoption, what are the minimal Constitutional standards to be applied to such a consent?

2. PARTIES

SYBIL JAMIESON COOMBS, PETITIONER
(Natural Mother of CHRISTOPHER J.)

MAINE DEPARTMENT OF HUMAN SERVICES
(By the Office of the Attorney General)

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3. REPORT OF OPINION BELOW

The decision rendered by the Maine Supreme Judicial Court on February 26, 1986 is reported as **In Re: Christopher J.**, 505 A.2d 795 (Me. 1986).

4. JURISDICTION

The decision of the Maine Supreme Judicial Court sought to be reviewed is dated February 26, 1986; the Order of said Court denying Petitioner's Motion for Reconsideration and Rehearing is March 14, 1986.

Petitioner relies on Title 28, U.S.C. Section 1257(3) to confer jurisdiction of the Supreme Court of the United States to review the decision in question by granting a Writ of Certiorari.

5. STATUTORY PROVISIONS INVOLVED

The case involves the following constitutional and statutory provisions:

a. **United States Constitution, amendment XIV, Section 1:**

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

b. **Maine Constitution, article I, Section 6-A:**

"Section 6-A. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof."

c. Title 22, M.R.S.A. Section 4050. See text reprinted in Appendix, p. 36

d. Title 22, M.R.S.A. Section 4055. See text reprinted in Appendix, p. 38

e. Title 19, M.R.S.A. Section 532 (1) (A). See text reprinted in Appendix, p. 34

6. STATEMENT OF THE CASE

This is a case in which the facts are not in dispute. The Petitioner's parental rights to her son were terminated with no finding of parental fault or unfitness. Both the trial court and the Maine Supreme Judicial Court found that ***through no fault of Petitioner, but due to circumstances completely out of her control,*** it was in the best interests of the child that her parental rights be terminated.

The Petitioner became pregnant in November, 1970 when she was a fifteen year old unmarried high school sophomore. After family consultation she entered a Catholic home for unwed mothers which placed new born infants for adoption. Christopher J. was born on August 20, 1971. He was preliminarily diagnosed as having a milk allergy and it was recommended that no adoption proceed without a four to six week observation period. The placing agency immediately told Petitioner and her mother that it could not place, nor pay to treat the infant, and advised the maternal grandmother that the Department of Health and Welfare (now the State of Maine Department of Human Services), the "Department", had resources to treat the child and then to arrange a suitable adoptive placement. The plan of this family was to have this child adopted into a nuclear family and not to have the child placed in foster care.

On September 23, 1971 the Petitioner and her mother met a Department caseworker at the Maine Tenth District Courthouse for the purpose of agreeing to the issuance of a Protective Custody Order to allow the Department to arrange to treat Christopher and place him for adoption with a suitable adoptive family. The Order was issued with a waiver of service and hearing by Petitioner. The Petitioner returned to school and had no further direct contact with the Department until 1983 when contact was made by the Department for the purpose of scheduling the very first judicial review of the Order issued in 1971.

In October and November of 1971, following the issuance of the Protective Custody Order, a Department caseworker telephoned Petitioner's mother and asked if the

family could care for Christopher as a temporary placement until he was considered medically adoptable. Petitioner's mother, who had given up an illegitimate child for adoption in 1947, unbeknownst to the family, reasoned that a temporary placement would be unendurable for the family and that the decision to have Christopher adopted should stand. She never told Petitioner of these communications. At the time the family's resources were drained by recent major surgery and a car accident sustained by the mother, and a heart attack suffered by the father. Both parents were unemployed and there were six children in the home including Petitioner.

During this early period neither Petitioner or her mother knew the true nature of the child's illness, or his prognosis. Christopher had been diagnosed as having Alpha I Antitrypsin Deficiency, a rare liver disease resulting in the degeneration of the liver, and subsequent death. At that time the prognosis for survival of these children was between 2 and 3 years. In January of 1973, when he was approximately 18 months old, Petitioner's mother received a call that Christopher was in the hospital in critical condition. She drove with Petitioner to see the child only to find he had been transferred to Boston Children's Hospital. They also learned he had not been adopted, was in foster care, and who the foster parents were.

Petitioner's mother called the foster parents and Boston Children's Hospital to obtain information on the child's condition. She learned from the doctor that Christopher was receiving a portacaval shunt operation and that he was the youngest child ever to undergo this surgery. She learned the nature of his illness, that his condition was most grave and that he was not expected to survive the surgery, and if he did he would not live much longer in any case. Petitioner's mother made a decision based on what she considered Petitioner's best interest. She told her daughter that the child had died, and she was never again contacted by the Department or the foster parents reinforcing her belief that he had, in fact, died.

Petitioner married her present husband in 1976 and became pregnant in 1978. Her physician requested genetic information concerning the child that had died to explore whether Alpha I Antitrypsin Deficiency could be transmitted

to other children. Again Petitioner's mother interfered by volunteering to make the call to the Department for this information. She was afraid Petitioner would learn that the child had not died at the time she told the family he had. She spoke with a Department worker and learned that the child had survived and was still alive.

Petitioner's mother told the Department worker that Petitioner believed the child to have been dead since January of 1973. At the hearing on termination in the Maine State District Court, the worker testified that she chose not to correct this belief, not to record this information in the Department files, or to notify her supervisor (Appendix at p.46). Petitioner's mother chose not to correct Petitioner's belief because she was afraid to admit she had lied. Although statutorily mandated, the Department chose to pursue a policy of making no effort to expose this child to his natural mother, or to inform her of his foster care placement, or his medical condition (including more than a dozen major hospital episodes). For twelve years, in direct contravention of Title 22, M.R.S.A. Section 4041 (1) the Department made no contact with Petitioner, even after learning that she believed the child to be dead. For twelve years they failed to bring any action to terminate her parental rights. For twelve years they simply failed to acknowledge Petitioner's existence.

Ironically, on May 3, 1983, the same Department worker who had contacted Petitioner's mother in 1971 and 1972, called Petitioner and visited her on the same day. It should be noted that Petitioner's mother has lived at the same address all these years, and Petitioner never left the community. Petitioner was informed that the child was alive, in long term foster care, and that a judicial review had been federally mandated and scheduled to review her rights and the child's placement. This was the first judicial review scheduled since the original Petition in September of 1971, again in contravention of state statute.

Petitioner's reaction: "Where have you been all these years?" The Department worker's response: "I guess we didn't do a very good follow-up job." Petitioner and her husband, upon learning that he was alive, decided that they wanted Christopher no matter how medically needy he might be or expensive those needs were. They were at that

time unaware of his condition, prognosis and the degree of liver deterioration, and when they learned all of this they were as determined to become a part of his life. Beginning in June of 1983 a series of review hearings were scheduled and continued to allow for psychological evaluations and medical reports. Non-traditional alternatives to reunification were suggested by Petitioner which were rejected by the Department and the foster mother. By June of 1984 it became apparent that neither the Department or the foster mother was going to agree to any form of reintroduction, and the Petitioner filed a Motion to Return Custody (Appendix at p.42.).

A federal civil rights action was commenced by Petitioner against the Department workers involved in October of 1983 pursuant to Title 42, Section 1983. In March of 1984 Petitioner agreed to consent to an open adoption if the child could be told who and where she was, and if she could meet him. This reasonable proposal, sensitive to his medical and emotional needs, was rejected by the Department and the foster mother. The State District Court continued any final hearing in this matter pending some medical stabilization. The child's condition continued to deteriorate during this period. In October of 1984 he was admitted to Boston Children's Hospital for an imminent liver transplant which failed to be completed due to the withdrawal of the donor organ by the family. Finally the Department brought a Petition to Terminate Parental Rights in July of 1985.

A two day hearing was held in the State District Court, and the court ordered termination of parental rights on October 11, 1985 (Appendix at p.31).. There was a great deal of medical testimony concerning his condition and the imminent liver transplant. The court terminated Petitioner's parental rights, absent any parental fault and absent any reunification efforts on the part of the State. The court found that "the biological mother, Sybil Jamieson Coombs would be a loving and caring mother as the foster mother has been for the past 14 years. That however, is not the issue." The court was compelled to find "that Sybil Jamieson Coombs' parental rights should be terminated if the child is to be given any chance to survive the physical and emotional impact of a liver transplant." Petitioner filed a timely appeal on October 17, 1985 to the Maine Supreme Judicial Court.

The decision of the Maine Supreme Judicial Court upheld the lower court's decision and reiterated that ***there was no parental fault.*** The issue formulated on appeal by the Petitioner was that "The findings of the District Court were not rationally supported by clear and convincing evidence and the order of termination is clearly erroneous". A copy of that decision is found in the Appendix at p.13. The child received his liver transplant pending oral arguments to the Maine Supreme Judicial Court. Following the entry of the mandate the child, who is fourteen years old, was adopted by the foster mother, with no notice to Petitioner, under Federal Subsidized Adoption.

7. REASONS FOR GRANTING WRIT

The States have generally been accorded the power to regulate family law and the welfare of children through it's parens patriae and police powers when there is evidence of parental abuse and neglect. This Court has limited that power by recognizing that family autonomy is a fundamental right. **Stantosky v. Kramer**, 455 U.S. 745 (1982).

Recognizing that the termination of a fundamental right constitutionally requires procedural due process safeguards this Court has addressed the issues of appointment of counsel for indigent parents in termination proceedings, **Lassiter v. Department of Social Services**, 452 U.S. 18 (1981), and the standard of proof required in such proceedings. **Santosky v. Kramer**, supra.

The justification for initial state intervention into family autonomy is a substantive showing of parental unfitness. **Quillion v. Wallcott**, 434 U.S. 246 (1978). This is based on the concept that absent a compelling justification, the State cannot interfere with the parental decision making that orders the family. **Wisconsin v. Yoder**, 406 U.S. 205 (1972). This Court has held that all parents are constitutionally entitled to a hearing on the issue of their unfitness before their children may be removed from their custody. **Stanley v. Illinois**, 405 U.S. 645 (1972). "Unfitness" is the standard authorizing state intervention. Dicta in **Santosky v. Kramer**, supra, at p. 761, n. 10 leads to the conclusion that a state cannot terminate parental rights on a no-fault basis.

This Court has not yet defined unfitness, has not yet articulated a standard, nor has it made clear whether a State may constitutionally terminate a parent's rights without showing parental unfitness. Petitioner believes that this case presents the facts necessary for this Court to address these issues and extend the line of cases cited herein to their constitutional conclusion, ***that conclusion being that the unfitness must be a result of the actions of the parent, the fault of the parent, and cannot be a result of circumstances out of the control of the parent, or the result of the non-feasance of the State.***

The Maine termination statute, Title 22, M.R.S.A. 4055 (text in Appendix at p.38), does not expressly provide for a showing of parental fault. The statute attempts to comply on it's face with the due process balancing test expounded by this court in **Mathews v. Eldredge**, 424 U.S. 319 (1976). It provides the State with a two prong burden: that termination of parental rights is in the best interests of the child, and that the parent is ***unable*** or ***unwilling*** to protect the child from jeopardy or to take responsibility for the child in a time reasonably calculated to meet his needs. It also provides that in the event the child is fourteen years of age or older there can be no termination if the child objects.

The termination statute does not require a showing that the state has complied with the statute requiring reunification efforts by the Department during the period a child is in protective custody. Title 22, M.R.S.A. Section 4050 (text is reprinted in Appendix at p.36). In this case the State District Court found no parental fault and specifically found that Petitioner would be a loving parent. (Appendix at p.31). The court found that the inability of Petitioner to protect Christopher from jeopardy within a time reasonably calculated to meet his needs was created by his physical condition and the factual circumstances of the case. In other words the decision to terminate was based solely on the best interests of the child. The Court also found that if no objection by a fourteen year old were part of the record at hearing there was no affirmative duty on the State's part to prove a lack of objection, in spite of the language of the statute.

The Maine Supreme Judicial Court upheld the lower court's termination of Petitioner's rights stating that the Peti-

tioner was unable to provide the emotional stability necessary for the child to survive the life-threatening medical problems and the aftermath of a liver transplant "because she, ***although through no fault of her own,*** has had no contact with him since his infancy." The Court found that the lower court's findings were "based on clear and convincing evidence and therefore satisfy the requirements of the Due Process Clause of the United States Constitution and the provisions of Title 22 M.R.S.A. Section 4055". The Court also found that the language of Section 4055 (3) "is carefully chosen to protect against the limited special situation where a child of the age of discretion does register an objection. It, however, does not require the court affirmatively to ask the child whether he objects, and, does not require the written consent that is explicitly required in the adoption statute, Title 19 M.R.S.A. Section 532". (Appendix at p.34). The reasoning contained in Justice Scolnick's dissent should assist in persuading this Court to grant the Writ of Certiorari.

At oral argument before the Maine Supreme Judicial Court one Justice proffered an analogy: "If a parent of a newborn went off to war and was held prisoner by the enemy for fourteen years, could his parental rights be terminated based on the length of separation regardless of the medical condition of the child upon his return?" The lack of a substantive standard for fault or unfitness based on the **fault of the parent**, created by the parent and not on circumstances beyond that parent's control has resulted in a myriad of State termination statutes which run the gamut from requiring totally debauched parental behavior to an almost total best interests standard, at least as applied in Maine in the instant case. There is great inconsistency as well in the weight given by State courts to the failure of the State to comply with their own reunification requirements. Often this failure leads to the conclusion that the parent's rights should be terminated. The citations for the various State statutes and an analysis of these issues is to be found in the Family Law Quarterly of the American Bar Association, Section of Family Law, Volume XIX, Number 3, Fall, 1985: "Due Process and the Termination of Parental Rights."

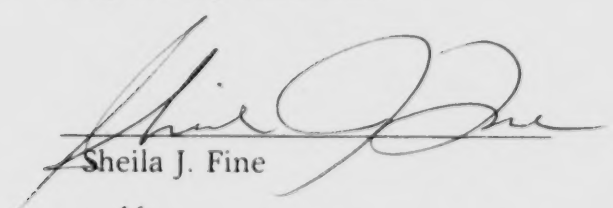
Petitioner includes in her appendix (at p.48) an article from the University of Maine Law Review, Volume 37, November 2, 1985: "In Re Daniel C: Reunification Efforts and the

Termination of Parental Rights." Both articles, and the facts of the instant case points up the need for this Court to extend **Santosky** and **Lassiter** to address the issues of the effect of complete lack of parental fault, and complete lack of reunification efforts on States' ability to terminate parental rights. The issue of the jurisdictional requirement of the consent of lack of objection of a fourteen year old to his or her adoption, or the termination of the natural parents rights, has been held in other states to have due process implications. **D.L.J. vs. W.D.R.**, 635 P.2d 834 (Alaska, 1981); **Matter of Adoption of Trent**, 624 P.2d 433 (Kan., 1981). In this case Christopher was never informed that the State had contacted his mother; that she believed him to be dead; that her whereabouts were known; and, that she wished to see him. How then could the Court determine whether or not there was an objection, and how could he have subsequently knowingly "consented" to his adoption following the termination?

CONCLUSION

The basic principles of Due Process have been ignored in the instant case. The Petitioner's (not to mention Christopher's) fundamental rights to family integrity have been terminated without any fault on the part of this Petitioner. The State failed to comply with their own reunification requirements, as a result of which they show, by clear and convincing evidence, that Petitioner is unable to protect her child from jeopardy in a time reasonably calculated to meet his needs. The child's rights are likewise terminated without his having any information about his natural mother, or about the termination proceedings. This is a case that shocks the conscience, and points up the need for this Court to speak to the criteria for the determination of unfitness to include fault on the part of the parent; and to the effect of the State's non feasance on the creation of that unfitness.

Respectfully submitted,



Sheila J. Fine

CERTIFICATE OF SERVICE

I, Sheila J. Fine, a member of the Bar of the Supreme Court of the United States and counsel of record for Sybil Jamieson Coombs, the Petitioner herein, hereby certify that on June 5, 1986, pursuant to Rule 28, Rules of the Supreme Court of the United States, I served three copies of the foregoing Petition for a Writ of Certiorari on the State of Maine, Department of Human Services by depositing such copies in the United States Post Office, Ogunquit, Maine, with first class postage prepaid, properly addressed to the Office of the Attorney General as follows:

Leigh Ingalls Saufly, Esq.
Senior Assistant Attorney General
221 State Street, Station 11
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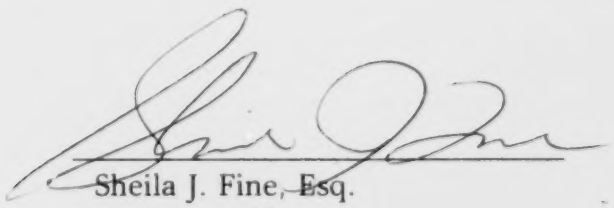
Dated: June 5, 1986



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MAINE SUPREME JUDICIAL COURT
Reporter of Deicsions
Decision No. 4054
Law Docket No. Yor-85-410

IN RE: CHRISTOPHER J.

Argued January 22, 1986
Decided February 26, 1986

Before McKUSICK, C.J., and ROBERTS, WATHEN, GLASSMAN, and SCOLNIK, JJ.

McKUSICK, C.J.

Sybil C., mother of Christopher J., appeals a judgment of the District Court (Biddeford) terminating her parental rights pursuant to 22 M.R.S.A. § 4055 (Supp. 1985-1986). Her main contention on appeal is that the record does not contain the quantum of evidence required both constitutionally and statutorily for termination of her parental rights.

Christopher was born on August 20, 1971, to Sybil, then a 15-year-old unwed high school student. Sybil and her family decided that adoption was in the best interest of the baby. Soon after his birth, however, it became apparent that Christopher had serious medical problems that would prevent his immediate adoption. Therefore, on September 23, 1971, Sybil voluntarily placed Christopher in the protective custody of the Maine Department of Health and Welfare, now renamed the Department of Human Services (Department).

The Department placed Christopher in the foster care of Mrs. M. when he was 11 weeks old. He has remained in her home continuously to the present, and she wishes to adopt him. Christopher has a liver condition called Alpha I Anti-Trypsin Deficiency, which has led to cirrhosis of the liver and has required him to undergo a series of surgeries and hospitalizations. At the time the District Court entered its order on October 11, 1985, Christopher was waiting for an urgently needed liver transplant.[1] Mrs. M. has cared for Christopher

[1]He received the liver transplant on December 11, 1985, while this appeal was pending.

throughout all these physical difficulties. When Christopher was one year old, she told the Department that she wished to adopt him, and repeated that request several times thereafter. Mrs. M.'s income, however, was insufficient to pay for Christopher's extraordinary medical expenses, and it was not until March of 1984 that the Department had the funds available to provide for a subsidized adoption pursuant to 19 M.R.S.A. § 541 (Supp. 1985-1986). For that reason Christopher has remained in Mrs. M.'s foster care for over 14 years.

Sybil has had no contact with Christopher since he was an infant. When he was two years old he became seriously ill and was expected to die. Believing that she was acting in Sybil's best interest, Sybil's mother told her that Christopher had died. Sybil remained under the impression that Christopher was dead until the Department contacted her on May 2, 1983, regarding a new federally required judicial review of Christopher's foster care. The Department had never attempted to contact Sybil before that time. Sybil immediately told the Department that she wanted to meet Christopher. However, because of Christopher's physical and mental condition, his doctors advised against such a meeting. Sybil complied with their recommendation. On July 2, 1984, she filed a petition for change of custody in District Court.

In June 1985 the Department petitioned for termination of Sybil's parental rights pursuant to 22 M.R.S.A. § 4055 so that Christopher could be adopted by Mrs. M. Section 4055, in pertinent part, requires that before termination may be ordered the District Court must find, based on clear and convincing evidence, that:

> (a) Termination is in the best interest of the child; and
>
> (b) Either:
>
> (i) The parent is unwilling or unable to protect the child from jeopardy and these circumstances are unlikely to change within a time which is reasonably calculated to meet the child's needs; [or]
>
> (ii) The parent has been unwilling or unable to take responsibility for the child within a time

> which is reasonably calculated to meet the child's needs . . .

22 M.R.S.A. § 4055(1) (B) (2) (a) & (b) (Supp. 1985-1986). ***See also Santosky v. Kramer,*** 455 U.S. 745, 769 (1982) (due process requires proof by clear and convincing evidence before parental rights may be terminated).

The District Court found that Sybil is ***unable to protect Christopher from jeopardy*** and that the circumstances are unlikely to change within a time that is resonably calculated to meet his needs and also that she is ***unable to take responsibility*** for Christopher within a time that is reasonably calculated to meet his needs. The District Court also found it to be in the best interest of Christopher that Sybil's parental rights be terminated. Sybil argues that those findings are not supported by clear and convincing evidence and that they are clearly erroneous. "Where clear and convincing evidence is required, the appropriate standard of appellate review is 'whether the factfinder could reasonably have been persuaded that the required factual finding was or was not proved to be ***highly probable.***' " ***In re John Joseph V.,*** 500 A.2d 628, 629 (Me. 1985) (quoting ***Taylor v. Commissioner of Mental Health and Mental Retardation,*** 481 A.2d 139, 153 (Me. 1984) (emphasis added)). The District Court's finding that the evidence before it was clear and convincing "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the court to judge the credibility of the witnesses." M.D.C. Civ. R. 52(a); ***see also In re Chesley B.,*** 499 A.2d 137, 138-39 (ME. 1985).

After a careful review, we hold that the record before the District Court did indeed contain the clear and convincing evidence required to support its findings of fact. The expert testimony before the court fully supports the court's conclusion that Sybil is ***unable*** to protect Christopher from jeopardy and that these circumstances are unlikely to change within a time reasonably calculated to meet his needs.[2]

---

[2]Because 22 M.R.S.A. § 4055(1) (B) (2) (b) in pertinent part requires that the parent be unwilling or unable (i) to protect the child from jeopardy ***or*** (ii) to take responsibility for the child, we need only discuss the findings of the District Court with regard to one of those requirements in order to determine whether there existed clear and convincing evidence to terminate Sybil's parental rights.

"[T]he word 'unable' [is] synonymous with incapable, and, as employed in its relevant statutory context, mean[s] that a parent is incapable, ***for whatever reason,*** to [protect his or her child from jeopardy]." ***In re John Joseph V.,*** 500 A.2d at 630 (emphasis added). The word "jeopardy" is defined by statute to mean "serious abuse or neglect, as evidenced by . . . serious harm or threat of serious harm." 22 M.R.S.A. § 4002(6) (A) (Supp. 1985-1986). " 'Abuse or neglect' means a threat to a child's health or welfare by physical or mental injury or impairment, . . . deprivation of essential needs or lack of protection from these, by a person responsible for the child." 22 M.R.S.A. § 4001(1) Supp. 1985-1986). "Serious harm" is defined as "serious injury" or "serious mental injury or impairment, evidenced by severe anxiety, depression or withdrawal, untoward aggressive behavior or similar serious dysfunctional behavior." 22M.R.S.A. § 4002(10) (A) & (B) (Supp. 1985-1986). In determining a time reasonably calculated to meet the child's needs, "the time frame which the court is gauging must be seen from the child's perspective." L.D. 2166, Statement of Fact (111th Legis. 1984). Using these definitions, the District Court could reasonably have been persuaded that it was proved to be highly probable that Sybil is unable to protect Christopher from jeopardy and that these circumstances are unlikely to change within a time that is reasonably calculated to meet his needs. ***See In re Dean A.,*** 491 A.2d 572 (Me. 1985) (severely traumatized child would suffer serious psychological injury if he were taken from his foster mother and returned to his natural mother).

The evidence shows that Christopher has a history of dealing with stress by eating foods prohibited on his strict medical diet. These diet deviations cause serious medical problems that jeopardize his health and that have in the past put him back into the hospital. Dr. David DeMaso, assistant clinical director of the Department of Psychiatry at the Judge Baker Guidance Center in Boston and psychiatric consultant to Christopher's liver transplant team, interviewed Christopher in 1984 and again in 1985. During those interviews Christopher told him that he considered Mrs. M. his "actual mother" and that he wanted to be adopted by his foster family. Furthermore, Christopher told him that he did not wish to see his biological mother. Based on the interplay between Christopher's emotional and physical health, Dr.

DeMaso testified that Christopher would be in jeopardy if Sybil's parental rights were not terminated:

> I think he would be in jeopardy for a couple reasons. I think, one, this youngster, particularly based on my contacts with him, views his foster mother as his actual mother, as the mother that he's known all his life. And I think the trauma of being taken away from that mother would be quitge emotionally stressful for this youngster. I think the second part that concerns me is that with this increased stress, and with the history of behaviorally having great difficulty at times complying with various medical regimens, that this could directly affect compliance, if he gets upset, around his liver illness; both pre-transplant, with his need for great compliance, around died, and medication; and also, post-transplant, because it's — again, it's not a procedure that's over in one week. It's a procedure that leads to an on-going process, and so I was concerned. One of the significant concerns in doing transplantations now is the issue of compliance; such that physicians on the transplant team want that to be the primary — one of the primary psychological assessments. If they have concerns about compliance, that's one of the things they worry about when they do the liver [transplant], because so much is required of the patient and their family.

Furthermore, the District Court could reasonably find that these circumstances are unlikely to change within a time that is reasonably calculated to meet Christopher's needs. Dr. DeMaso testified that Christopher critically needs now, and in the future, significant stability and a sense of belonging to his family — something that Sybil is not able to provide.

Dr. James Maier, a Portland psychiatrist, also concluded that Sybil could not protect Christopher from jeopardy. Dr. Maier made an independent evaluation of Christopher, his foster mother, and his biological mother pursuant to an order of the District Court and an agreement by the parties. Dr. Maier testified:

> I think the jeopardy to Chris, were he to be taken out of his foster home, would be enormous. In effect [it would be disastrous]. In effect, it's a kind of a sword of Solomon hanging over his head, to have to face the

possibility of being disrupted and taken away from his foster family, which is the only family that he's known and grown up with, at a time when the strongest possible psychological stability for Chris and for the family system that he's operating in, will be necessary to his survival from this surgery. It would seem to be extremely unwise to even contemplate a change in custody. . . .The jeopardy that I would foresee would be that, were parental rights not terminated, the possibility of some action by [Sybil] or her lawyer, which Chris in some way might get wind of, could potentially threaten his emotional stability and make him more anxious, at a time when he can ill afford to have any additional stress in his life.

Dr. Maier saw jeopardy to Christopher's "medical management" if the boy became aware of Sybil's efforts to reintroduce herself into his life. He had further explained his view as follows:

I felt that a disruption of Chris' life by the introduction of a natural parent whom Chris himself had shown no spontaneous interest in getting in touch with, at a time when his physical health and emotional health were still precarious, might cause some real complications or problems, not only for Chris, but for the family system that he was living in. And I felt that this, in turn, could have consequences that would be deleterious to his health in the form of, perhaps, his anxiety taking a form of decreased compliance with taking medication or with his diet, or other kinds of behavior which could jeopardize his condition.

Finally, letters from Christopher's gastroenterologist, Dr. Richard Grand, and his pediatrician, Dr. Patricia Adams, were admitted in evidence. Dr. Grand wrote:

Through all of [Christopher's medical problems], numerous visits to me and to Dr. Adams, as well as twelve hospitalizations at the Children's Hospital and several in New Hampshire, Mrs. [M.] has been remarkably supportive, loving, and devoted. She has spent numerous hours in arranging for his home medical care, his counseling program in school, his special classes and other special needs. She is accustom-

ed to dealing with his emotional lability which is secondary to his liver disease. In addition, she has effectively taught Christopher to join in family activites so that he feels quite comfortable with the other children at home. Indeed, he considers himself one of the family.

At this point, it would be extremely disruptive, damaging, and irresponsible to allow him to be removed from this supportive environment. His long-term survival depends upon continued devotion to all of the details of his medical management, as well as the security of people who know him well and are accustomed to his habits and behavior. Mrs. [M.] has established an outstanding relationship with Christopher and it would be a great mistake to interfere with that relationship now.

Christopher should remain with Mrs. [M.]. From my point of view, there is no alternative.

And Dr. Adams wrote:

Mrs. [M.] is so attuned to Chris' problems, how to interpret them, and what to do when he has one, I am sure she is responsible for him doing as well as he has done over the past years. I feel that to remove Chris from this environment he considers home, and has proved to be a good situation for him, would be to court disaster, both emotionally and physically.

The expert testimony also showed that the termination order is in Christopher's best interests. Dr. DeMaso testified about the effects of the liver transplant on Christopher:

[T]he liver transplantation process is a quite involved and quite stressful process. It's not a simple replacement of the liver and everything is all over. It's an on-going process that's actually life-long, even if it's successful, with longtime compliance of medication. So it doesn't mean that suddenly that Christopher is suddenly all better in that sense. . . . So that we really want the child and his family in as optimal an emotional state as we possibly can when they go through this procedure.

Based on his interviews with Christopher, Dr. Demaso recommended that Christopher be adopted by Mrs. M. as soon as possible:

> I strongly felt Chris viewed his foster home as his actual home, and my impression was that this home appeared caring and nurturing, and had, indeed, gone through [his] long medical course [of treatment with him]. And I thought that adoption should — I strongly endorsed adoption as a way of providing this youngster with some more sense of being there. And to do it as soon as possible.

Gabrielle Brenninkmeyer, a senior social worker at the Judge Baker Center who evaluated Christopher, Mrs. M., and Sybil in conjunction with Dr. Demaso at the request of the parties, testified that she too recommended adoption as soon as possible:

> I think it's important at this time . . . [be]cause I believe that any child needs to know where he belongs and where he's going to grow up. And I think in Christopher's situation, it becomes even more urgent, given his medical problems.

Finally, Dr. Maier testified:

> I would concur with the recommendations of all of the professionals that I have read about; that, legally, adoption be allowed to take place as soon as possible, so that Chris can have that psychological stability going into life-threatening surgery.

This evidence makes it highly probable that termination of Sybil's parental rights is in Christopher's best interests in order to give him the emotional stability necessary to cope with a liver transplant and its long-term follow-up treatment.

Based on the testimony and letters of the experts, the District Court could reasonably have been persuaded that it was proved to be highly probable that termination of Sybil's parental rights is in Christopher's best interests, that Sybil is unable to protect Christopher from jeopardy, and that the circumstances are unlikely to change within a time that is reasonably calculated to meet his needs. The record shows that Christopher needs emotional stability for an extended period in order to survive life-threatening medical problems and the aftermath of a liver transplant. Sybil, however, is unable to provide this stability within the time that Christopher needs it because she, although through no fault

of her own, has had no contact with him since his infancy. The findings of the District Court are based on clear and convincing evidence and therefore satisfy the requirements of the Due Process Clause of the United States Constitution and the provisions of 22 M.R.S.A. § 4055.

Sybil's remaining argument on appeal is that 22 M.R.S.A. § 4055(3) (Supp. 1985-1986) requires Christopher's written consent before the court may terminate her parental rights. Section 4055(3) provides, "The court shall not order termination [of parental rights] if the child is at least 14 years old and ***objects to the termination.***" (Emphasis added) Sybil contends that because the adoption statute, 19 M.R.S.A. § 532 (1981), requires children 14 years of age and older to consent in writing before they are adopted, the parental rights termination statute must also be read to contain such a requirement. The plain language of section 4055(3), however, contains no mention of such a requirement. "In construing a statute our duty is to give effect to the intent of the Legislature as evidenced by the language of the statute. If the meaning of the language is plain, we must interpret the statute to mean exactly what it says." ***Stone v. Board of Registration in Medicine,*** — A.2d —, — (Me. 1986) (quoting ***Concord General Mutual Insurance Co. v. Patrons-Oxford Mutual Insuarnce Co.,*** 411 A.2d 1017, 1020 (Me. 1980)). Section 4055(3) merely reflects the desire of the legislature to assure that no termination of parental rights would be ordered against the will of a child over the age of 14. The language of section 4055(3) is carefully chosen to protect against the limited special situation where a child of the age of discretion does register an objection. It, however, does not require the court affirmatively to ask the child whether he objects, and, ***a fortiori,*** does not require the written consent that is explicitly required in the adoption statute, 19 M.R.S.A. § 532.

The entry is:

Judgment affirmed.

Roberts, Wathen, and Glassman, JJ., concurring.

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NOTICE: This opinion is subject to formal revision before publication in the Maine Reporter. Readers are requested to notify the Reporter of Decisions, Box 368, Portland, Me. 04112, of any typographical or other formal errors before the opinion goes to press.

SCOLNIK, J., dissenting

Because I believe that the District Court could not reasonably have been persuaded that it was highly probable that the biological mother was unable to protect her son from jeopardy, I respectfully dissent.

The flaw in the Court's analysis, in my view, is its mistaken evaluation of the expert testimony quoted at length in the opinion. In concluding that the record supports a finding of jeopardy, the Court substantially relies on statements from medical experts that ***removal*** from the foster parents' home would jeopardize the child. It quotes the testimony of Dr. Demaso, who stated: "I think the trauma ***of being taken away*** from [the foster] mother would be quite emotionally stressful for this youngster." (emphasis added). The opinion also refers to the testimony of Dr. James Maier who similarly testified to the effects of removal. He said: "I think the jeopardy to Chris, ***were he to be taken out of his foster home,*** would be enormous. In effect [it would be disastrous]. In effect, it's a kind of a sword of Solomon hanging over his head, to have to face the possibility of being disrupted ***and taken away*** from his foster family. . . . It would seem to be extremely unwise to even contemplate a ***change in custody.***" (emphasis added). Again, the opinion includes excerpts from letters of Drs.' Richard Grand and Patricia Adams. Dr. Grand wrote: "[I]t would be extremely disruptive, damaging and irresponsible to allow him ***to be removed*** from this supportive environment. . . . Christopher ***should remain*** with Mrs. [M.]. From my point of view, there is no alternative." (emphasis added). Dr. Adams wrote: "I feel that ***to remove Chris from this environment he considers home*** . . . would be to court disaster both emotionally and physically." (emphasis added).

Since a denial of a petition for termination need not in any way affect child custodial arrangements or arrangements to visit with the birth parent, away from the foster home, evidence of the effects of removal is irrelevant to this parental termination proceeding. ***See In re Sabrina M.,*** 460 A.2d 1009,1016 (Me. 1983) ("The child's interest in safety does not arise in a termination proceeding because, under our statutory structure, when such a proceeding commences, the child is not in a dangerous environment and [a] . . . failure to terminate parental rights does not return the child to a

dangerous environment; ***rather, the child remains with his present custodian.***" (emphasis added). The Court's analysis is erroneously based on an assumption that absent a termination of parental rights, protective measures are unavailable to prevent removal from the foster home or stability threatening visitation. The Department is free through the mechanism of judicial review of the custody order to request the imposition of whatever conditions are deemed necessary to ensure that reintroduction efforts are undertaken at the child's foster home and under close supervision by appropriate personnel. ***See*** 22 M.R.S.A. § 4038(2), (4) (Supp. 1985-1986). Accordingly, the Court's reliance on evidence of the effects of removal distorts its review of the District Court's finding.

The remaining expert testimony attempting to establish a threat of harm to the child if the natural mother were reintroduced into the child's life is so vague and speculative that the District Court could not reasonably have been persuaded that the natural mother was unable to protect her child from jeopardy. Again, the Court leans heavily on the testimony of Dr. Maier who stated that: "The jeopardy that I would forsee would be that, were parental rights not terminated, the ***possibility of*** some action by [Sybil] or her lawyer, which Chris in some way might get wind of, could potentially threaten his emotional stability and make him more anxious, at a time when he can ill afford to have an additional stress in his life." (emphasis added). He went on to say that a disruption of the child's life by the introduction of the natural parent "***might cause*** some real complications or problems [for Chris]. . . . And . . . this, in turn, ***could have consequences*** that would be deleterious to his health in the form of, ***perhaps,*** his anxiety taking a form of decreased compliance with taking medication or with his diet, or other kinds of behavior which ***could jeopardize*** his condition." (emphasis added). The remaining quoted portions of the expert testimony relate to the best interests of the child. I concede that this evidence clearly supports a finding that termination would be in the best interests of the child. Because this criterion, however, must not be examined until it is first determined that the evidence clearly and convincingly demonstrates that the natural mother is unable to protect Christopher from jeopardy within a time reasonably calculated to meet the child's needs, ***In re Shannon R.,*** 461,

A.2d 707,712 (Me. 1983), it is imperative that the consideration of the inability-to-protect issue not unconsciously color the Court's judgment.

The State can point to no evidence of harmful results from any attempts at supervised contact between mother and child. The record does show that the mother would be entirely cooperative and would abide by any restrictions as to time, place, frequency and duration of any proposed contacts. No evidence of a deficiency in her parenting abilities has been presented. There is no evidence whatsoever demonstrating that steps short of this extreme action could not be undertaken to accomplish the protection of all interests involved. ***Cf. In re Daniel C.,*** 480 A.2d 766,733 (Me. 1984) (Violette, J., dissenting) ("The break-up of the family unit should, however, be a last resort, when all else has failed.").

Rather than attempting to design a statutorily mandated plan during the fourteen years the child has been in the Department's custody, ***see*** 22 M.R.S.A. § 4041(1) (Supp. 1985-1986), the State pursued a policy of making no effort whatsoever to expose Christopher to his natural parent. More shocking is the fact that when the Department learned in 1978 that Sybil believed Christopher was dead, it did absolutely nothing to correct this erroneous belief. Amazingly, one of the caseworkers for the Department testified that she believed "it was possible to complete an adoption without notifying the natural parents." Instead of making any attempt to inform Sybil that her child was alive, the Department let the natural bonding between Christopher and his foster mother continue to be enhanced and now, ironically, argues that in order not to interfere with the stability that that bonding promoted, termination is required. ***Compare In re Daniel C.,*** 480 A.2d at 773 (Violette, J., dissenting) ("The department could, by adopting a policy of doing nothing and letting nature run its course, create the inexorable result that the majority of these cases would end in the termination of parental rights."). While the termination statute focuses on the conduct of the parent rather than the shortcomings of the Department, the Department's egregious nonfeasance is a factor to be considered in evaluating the parent's conduct to determine whether there is clear and convincing evidence that Sybil is unable to protect her son from jeopardy. ***In re Daniel C.,*** 480 A.2d at 771.

"Few forms of state action are both so severe and so irreversible" as a decision terminating parental rights. ***Santosky v. Kramer,*** 455 U.S. 745,759 (1982), ***quoted in In re Shannon R.,*** 461 A.2d at 715. The clear and convincing evidentiary standard is required in these cases in part to force states to present sufficient proof of their allegations rather than to allow decisions to be made solely on the basis of the child's best interests as perceived by judges. ***Santosky v. Kramer,*** 455 U.S. at 769.

I conclude that the District Court was clearly erroneous in finding that the evidence was sufficiently persuasive as a matter of law to meet the required evidentiary standard. Testimony couched in terms of "possibility," "could potentially threaten," "might cause," "could have consequences" or "could jeopardize," is clearly not the kind of clear and convincing evidence required to show that a mother is unable to protect her son from jeopardy.

I would vacate the order and remand to the District Court with instructions to deny the petition to terminate parental rights.

STATE OF MAINE — DISTRICT COURT
DISTRICT TEN
YORK, ss. — DIVISION OF E. YORK
DOCKET NO. 71/2-2CN

In re:

CHRISTOPHER PAUL JAMIESON} ORDER

This matter came before the court for hearing on the state's Petition for Termination of PARENTAL Rights dated June 28, 1985, served on Sybil Jamieson Coombs, mother and Brian Lincoln, the punative father, who consented to Termination of Parental Rights before the court on July 1, 1985 in Springvale, Maine.

Based on all the evidence adduced at the hearings on the Petition, the court finds that it is in the best interest of Christopher Paul Jamieson that the parental rights of his biological mother, Sybil Jamieson Coombs be terminated.

In so finding, the court does not find that Sybil Jamieson Coombs is unwilling to protect the child from jeopardy and that the attendant circumstances are unlikely to change within a time which is reasonably calculated to meet the needs of Christopher Paul Jamieson or that she is unwilling to take responsibility for Christopher Paul Jamieson within a time which is reasonably calculated to meet his needs, but rather that she is unable to do so given the circumstances of Christopher Paul Jamieson.

The court finds that the biological mother, Sybil Jamieson Coombs would be a loving and caring mother as the foster mother, Sylvia McDonald has been for the past 14 years. That, however, is not the issue.

The Court has considered the fact that Christopher Paul Jamieson has lived with Sylvia McDonald for 14 years during which she saw him and supported him through 17 hospitalizations, some life-threatening, and has in fact become his psychological mother.

Because Christopher Paul Jamieson must be given a liver transplant within the next few months or face certain death the court has also considered what a placement back into the biological mother's home or how an introduction to her would affect the child.

The court has also considered the child's emotional and physical needs and is compelled to find, by overwhelming expert testimony, that Sybil Jamieson Coombs' parental rights should be terminated if the child is to be given any chance to survive the physical and emotional impact of a liver transplant.

Lastly, the brief of Sybil Jamieson Coombs suggests that the statute is very clear that a 14 year old ***must consent*** to the termination of his parents' rights. The court finds that Title 22 § 4055 (3) requires an objection of the child if he is 14 years of age and not a consent as urged by Sybil Jamieson Coombs.

The testimony elicited contains no such objection and the court concludes as a matter of law that the state has met its statutory burden.

WHEREAS, IT IS HEREBY ORDERED that the parental rights of Sybil Jamieson Coombs in Christopher Paul Jamieson are terminated.

Dated: October 11, 1985

_____

Judge, District Court

A true copy.
ATTEST:_____

Clerk

STATE OF MAINE

YORK, ss

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No. Yor-85-410

In re: CHRISTOPHER J. } ORDER

Upon motion of appellant for reconsideration and rehearing, It is ORDERED that the motion be, and it hereby is, DENIED. The mandate shall issue forthwith.

Dated this fourteenth day of March, 1986.

For the Court,

_____

Chief Justice

3. Common Law

Legal adoption by one of another's offspring was unknown at common law and existed only by virtue of statute. In re Williams (1958) 154 Me. 88, 144 A.2d 116: In re Goodwin's Estate (1952) 147 Me. 237, 86 A.2d 88· Gatchell v. Curtis (1936) 134 Me. 302, 186 A. 669; Appeal of Simmons (1922) 121 Me. 97, 115 A. 765.

The adoption of a minor child, and the giving of it in adoption to persons other than its natural parents, was a procedure and created a status unknown to the common law. Blue v. Boisvert (1948) 143 Me. 173, 57 A.2d 498.

Legal adoption by one person of the offspring of another was unknown to the laws of England and Scotland; it was known to the Roman law, and was said to have been known to the Athenians and Spartans, and to other ancient peoples. Appeal of Simmons (1922) 121 Me. 97, 115 A.765.

4. Procedure, generally

Legal adoption resulted if statutory procedure was followed, but failed if any essential requirement was not complied with. Blue v. Boisvert (1948) 143 Me. 173, 57 A.2d 498.

5. Adoption by estoppel of Implication

Mere passage of 4½ years, during which petitioners had child under foster home placement program, did not create an estoppel depriving legally entitled custodian of legal rights to child or furnish basis for implied contract of adoption in absence of showing that the commissioner of health and welfare had made promises to petitioners or otherwise acted by affirmative conduct to induce them to believe that they were being given potential rights to custody or adoption. Roussel v. State (1971) Me., 274 A.2d 909.

§ 532. Consent for adoptions

1. **Consent required.** Before any adoption is granted, written consent to the adoption must be given by:

A. The child, if he is at least 14 years old;

B. Each of the child's living parents, except as provided in subsection 2;

C. The person or agency having legal custody or guardianship of the child or to whom the child has been surrendered and released; and

D. A guardian appointed by the court when the child has no living parent, guardian or legal custodian who may consent.

2. Consent not required. Consent to adoption shall not be required of the following:

A. A parent who has been adjudged, before the effective date of this Act, and after notice and hearing, to:

(1) Have willfully abandoned the child; or

(2) Be unwilling or unable to undertake parental responsibility;

A-1. A parent whose parental rights have been terminated under Title 22, section 4051, et seq.;

B. A father who is not required to give consent under section 532-C;

C. Repealed.

D. The parents who have executed a surrender and release under section 532-A;

E. A parent whose parental rights have been voluntarily or judicially terminated and transferred to a public agency or a duly licensed private agency under the law of another state or country; and

F. The parents of a person to be adopted who is at least 18 years old.

3. Repealed. 1979, c.733, § 9.

4. Consent given before a probate judge. Except as provided in subsection 5, consent shall be given in front of a judge of probate. Before consent is given, the judge shall fully explain the effect of that consent, and shall make a determination that the consent is freely the[1] knowledgeably given.

5. Consent before a justice of the peace or notary public. Consent may be acknowledged before a justice of the peace or notary public, who is not an attorney nor a partner, associate nor an employee of an attorney for the adopting parents, if consent is given by:

A. Repealed.

B. The Department of Human Services or by an adoption agency duly licensed in Maine; or

C. Repealed.

D. A public agency or duly licensed private agency to whom parental rights have been transferred under the law of another state or country.

R.S.1954, c. 158, § 37; 1959, c. 242, § 8; 1967, c. 432, §§ 2, 3; 1969, c. 370; 1969, c. 437, §§ 3, 4; 1973, c. 791, § 1, eff. April 1.

"B. Assuring that the parents have ample opportunity to visit with the child when this is not detrimental to the best interests of the child:

"C. Periodically reviewing with the parents why the child was removed, what must occur for the child to be returned and the services which are available to assist them; and

"D. Petitioning for judicial review and return of custody of the child to his parents at the earliest appropriate time."

Subsection 2: Chapter 772 repealed and replaced subsection, which prior thereto read:

"Discontinuation of services. The following provisions shall govern discontinuation of services.

"A. The department may discontinue these efforts with either parent, if that parent:

"(1) Cannot be located; or

"(2) Refuses or is unable to make a good faith effort toward rehabilitation and reunification.

"B. When the department discontinues efforts to return the child to a parent, it shall give written notice of this decision to that parent at his last known address. This notice shall include the specific reasons for the department's decision, the specific efforts the department has made in working with the parent and child and a statement of the parent's rights under section 4038. This notice requirement may be met by service of a copy of a petition to terminate parental rights under subchapter VI.

"C. If the department discontinues efforts to return the child to a parent, but does not seek termination of parental rights, then subsection 1, paragraphs A and B, shall still apply."

Derivation:

R.S. 1954, c. 25, § 256.
1961, c. 417, § 68.
1969, c. 85, § 1.
1975, c. 396, § 2.
1977, c. 577, § 3.
1977, c. 644, § 1.
1977, c. 652, § 2.
Former §§ 3798, 3803 of this title.

Notes of Decisions

1. Family reunification

Considering extraordinary nature of termination of parental rights, Department of Human Services must, prior to seeking termination, make effort to reunite family as mandated by this section and § 4003 of this title; if those efforts fail, Department must, at termination hearing, show clearly and convincingly that it has made those efforts and that parents definitely gave up their parental interests and that situation was not likely to change. In re Shannon R. (1983) Me., 461 A.2d 707.

Where there was no evidence in record of proceeding to terminate mother's parental rights of any action taken by Department of Human Services during year prior to termination petitions with regard to reuniting mother and children, Department did not meet its burden of showing clearly and convincingly that it made statutorily mandated effort to reunite family. Id.

Legislature did not intend that entire burden of family reunification should rest on parent under this section providing that when child has been ordered into custody of Department of Human Services, such agency shall provide, arrange or coordinate services to facilitate rehabilitation and reunification of parents and child. Id.

SUBCHAPTER VI

TERMINATION OF PARENTAL RIGHTS

Section

4050. Purpose [New].
4051. Venue.
4052. Termination petition; petitioners; time filed; contents.
4053. Service.
4054. Hearing on termination petition.
4055. Grounds for termination.
4056. Effects of termination order.
4057. Termination orders of other states.

Cross References

Consent for adoptions, see title 19, § 532.

Termination of parental rights, see title 19, § 533-A.

§ 4050. Purpose

Recognizing that instability and impermanency are contrary to the welfare of children, it is the intent of the Legislature that this subschapter:

1. Termination of parental rights. Allow for the termination of parental rights at the earliest possible time after rehabilitation and reunification efforts have been discontinued and termination is in the best interest of the child;

2. Return to family. Eliminate the need for children to wait unreasonable periods of time for their parents to correct the conditions which prevent their return to the family;

3. Adoption. Promote the adoption of children into stable families rather than allowing children to remain in the impermanency of foster care; and

4. Protect interests of child. Be liberally construed to serve and protect the best interests of the child.

1983, c. 772, § 7.

§ 4051. Venue

A petition for termination of parental rights shall be brought in the court that issued the final protection order. The court, for the convenience of the parties or other good cause, may transfer the petition to another district or division. A petition for termination of parental rights may also be brought in a Probate Court as part of an adoption proceeding as provided in Title 19, chapter 9,[1] when a child protective proceeding has not been initiated.

1979, c. 733, § 1981, c. 369, § 13, eff. May 29, 1981.

[1]Section 531 et seq. of title 19.

1981 Amendment. Chapter 369 added 3rd sentence.

§ 4052. Termination petition; petitioners; time filed; contents

1. Petitioner. A termination petition may be brought by the custodian of the child.

2 . Time filed. A termination petition may be brought no earlier than 3 months after disposition under section 4036 or under Title 19, section 213, 214 or 752.

3. Contents of petition. A termination petition shall be sworn and shall include at least the following:

A. The name, date and place of birth and municipal residence, if known, of the child;

B. The name and address of the petitioner and the nature of his relationship to the child;

C. The name and municipal residence, if known, of each of the child's parent's

D. The names and address of the guardian ad litem of the child in the related child protection proceeding or adoption proceeding;

E. A summary statement of the facts which the petitioner believes constitute the basis for the request for termination;

F. An allegation which is sufficient for termination;

G. A statement of the effects of a termination order; and

H. A statement that the parents are entitled to legal counsel in the termination proceedings and that, if they want an attorney and are unable to afford one, they should contact the court as soon as possible to the request appointed counsel.

4. Hearing date. On the filing of a petition, the court shall set a time and date for a hearing.

1979, c 733 § 18; 1981, c. 369, § 14, eff. May 29, 1981; 1983, c. 249, § 1.

1981 Amendment. Subsection 3, D: Chapter 369 added "or adoption proceeding".

1983 Amendment. Subsection 2: Chapter 249 inserted "213, 214 or".

§ 4053. Service

The petition and the notice of hearing shall be served on the parents and the guardian ad litem for the child at least 10 days prior to the hearing date. Service shall be made in accordance with the District Court Civil Rules.

§ 4054. Hearing on termination petition

The court shall hold a hearing prior to making a termination order. 1979, c. 733 § 18.

§ 4055. Grounds for termination

1. Grounds. The court may order termination of parental rights if:

A. One of the following conditions has been met;

(1) Custody has been removed from the parent under:

(a) Section 4035 or 4038;

(b) Title 19, section 213, 214 or 752; or

(c) Section 3792 prior to the effective date of this chapter; or

(2) The petition has been filed as part of an adoption proceeding in Title 19, chapter 9;[1] and

B. Either:

(1) The parent consents to the termination. Consent shall be written and voluntarily and knowlingly executed in court before a judge. The judge shall explain the effects of a termination order; or

(2) The court finds, based on clear and convincing evidence, that:

(a) Termination is in the best interest of the child; and

(b) Either:

(i) The parent is unwilling or unable to protect the child from jeopardy and these circumstances are unlikely to change within a time which is reasonably calculated to meet the child's needs;

(ii) The parent has been unwilling or unable to take responsibility for the child within a time which is reasonably calculated to meet the child's needs;

(iii) The child has been abandoned; or

(iv) The parent has failed to make a good faith effort to rehabilitate and reunify with the child pursuant to section 4041.

(c) Deleted.

[1]Section 531 et seq. of title 19.

2. Considerations. In deciding to terminate, the court ***shall consider the needs of the child,*** including the child's age, the child's attachments to relevant persons, periods of attachments and separation, the child's ability to integrate into a substitute placement or back into his parent's home and the child's physical and emotional needs.

3. Objection by child. The court shall not order termination if the child is at least 14 years old and objects to the termination.

1979, c. 733 § 18; 1981, c. 369, §§ 15, 16, eff. May 29, 1981; 1983, c. 249, § 2; 1983, c. 772, §§ 8, 9.

1981 Amendment. Subsection 1, A: Chapter 369 repealed and replaced this paragraph, which prior thereto read:

"A. Custody has been removed from the parent under:

"(1) Section 4035 or 4038;

"(2) Title 19, section 752; or

"(3) Section 3792 prior to the effective date of this chapter; and"

Subjection 1, B(2)(a): Chapter 369 added "or has willfully abandoned the child or has refused to take responsibility for the child".

1983 Amendments. Subsection 1, A(1)(b): Chapter 249 inserted "213, 214 or".

Subsection 1, B(2)(a): Chapter 772 substituted "Termination is in the best interest of the child; and" for "The parent is unwilling or unable to protect the child from jeopardy or has willfully abandoned the child or has refused to take responsibility for the child;".

Subsection 1, B(2)(b): Chapter 772 substituted "Either" for "The circumstances are unlikely to change in a reasonable time; and" in the introductory paragraph.

Subsection 1, B(2)(b)(i) to (iv): Added by c. 772.

Subsection 1, B(2)(c): Chapter 772 deleted clause, which read:

"termination is in the best interests of the child".

Subsection 2: Chapter 772 inserted "the child's" preceding "attachments", deleted ",and" following "separation", and added "and the child's physical and emotional needs."

Notes of Decisions

In general 1
Abandonment 2
Evidence 2.6
Findings 2.7
Presumptions and burden of proof 2.5
Review 3

1. In general

considering extraordinary nature of termination of parental rights, Department of Human Services must, prior to seeking termination, make effort to reunite family as mandated by §4003 and § 4041 of this title; if those efforts fail, Department must, at termination hearing, show clearly and convincingly that it has made those efforts and that parents definitely gave up their parental interests and that situation was not likely to change. In re Shannon R. (1983) Me., 461 A.2d 707.

Initial phase in proceedings terminating parental rights must involve some showing by state that parent is unwilling or unable to protect child, that parent has willfully abandoned child, or that parent has refused to take responsibility for child and that circumstances are unlikely to change; after that initial showing, state must show that termination is in best interests of child. Id.

2. Abandonment

Finding of abandonment in proceeding to terminate parental rights cannot be predicated solely on best interests of child. In re Shannon R. (1983) Me., 461 A.2d 707.

A mother's mere flicker of interest in a child is not sufficient to bar a finding of abandonment in a proceeding to terminate parental rights. Id.

2.5. Presumptions and burden of proof

Department of Human Services failed to meet its burden of proving mother failed to take responsibility for her child, where rather than proving mother's conscious refusal to care for child, Department merely proved her inability to do so. In re Merton R. (1983) Me., 466 A.2d 1268.

2.6. Evidence

Language "has refused to take responsibility for the child" in this section governing termination of parental rights requires evidence of willfulness. In re Merton R. (1983) Me., 466 A.2d 1268.

2.7. Findings

In parental termination cases, this section governing termination requires ultimate factual conclusions of trial judge be based upon clear and convincing evidence. In re Merton R. (1983) Me., 466 A.2d 1268.

3. Review

Judge's findings in proceeding to terminate mother's parental rights that mother did nothing which indicated to Department of Human Services that she wished further consideration as to parental rights, that mother had willfully abandoned children prior to commencement of proceeding, and that mother would not change her position with regard to either child unless and until a petition for termination was filed were not supported by clear and convincing evidence. In re Shannon R. (1983) Me., 461 A.2d 707.

Judge's findings in proceeding to terminate parent rights that parent took no action prior to service of petition to terminate parental rights which would tend to indicate desire, willingness or ability to resume custody of children was clearly erroneous, inlight of evidence that report was received by Maine Department of Human Services prior to service of petition which clearly stated that mother wanted to regain custody of her children and wanted them placed in foster care in Pennsylvania so tht she could visit them. Id.

§ 4056. Effects of termination order

1. Parent and child divested of rights. An order terminating parental rights divests the parent and child of all legal rights, powers, privileges, immunities, duties and obligations to each other as parent and child, except the inheritance rights between the child and his parent.

STATE OF MAINE

YORK, SS.

MAINE DISTRICT COURT
TENTH DISTRICT
DIVISION OF
EASTERN YORK

IN RE: CHRISTOPHER PAUL JAMIESON }
PETITION FOR PROTECTIVE
CUSTODY OF MINOR CHILD(REN)

The State of Maine Department of Health and Welfare, by its duly authorized agent, Bradley B. Ronco, represents as follows:

1. Sybil Clare Jamieson of Wells in the County of York and State of Maine is the only legal living parent of the following minor child:
Christopher Paul Jamieson born August 20, 1971 at Biddeford, Maine.

2. Said minor child is now living in Wells, Maine.

3. Said minor child is living in circumstances which are seriously jeopardizing its health, welfare, or morals, and said minor child is in need of protective custody of an immediate and emergency nature.

WHEREFORE the said petitioner prays as follows:

1. That the Court fix a time for hearing of this petition and order notice thereof to the parent of said child.

2. That, after hearing, suitable and proper provision be ordered by the Court for the care, custody, support and education of said child in accordance with the provisions of Section 3792 of Title 22. M.R.S.A. 1964 and acts amendatory thereof and additional thereto.

Dated at Saco, Maine this 23rd day of September A.D. 1971.

STATE OF MAINE
DEPARTMENT OF HEALTH AND WELFARE

By s/Bradley B. Ronco
Its duly authorized agent

CW-1

ORDER OF HEARING AND NOTICE

STATE OF MAINE
YORK, SS

MAINE DISTRICT COURT
TENTH DISTRICT
DIVISION OF
EASTERN YORK

On the foregoing petition, hearing is ordered at the Tenth District Court Room in Saco in said County of York on the 23rd day of September A.D. 1971, at nine o'clock in the fore noon, and it is further ordered that Sybil Clare Jamieson, the only legal living parent of said child be notified of the pendency of these proceedings by being served in hand with a copy of this Petition at least (10) days prior to the hearing date, that they may then and there appear and be heard.

notice of service and hearing
is hereby waived.

s/George D. Varney
Judge of Tenth District Court

Signed: Sybil Clare Jamieson

PROOF OF SERVICE

TRUE COPY
BEST: Vivian M. Hukey

On the_____day of _____, A.D. 19____ I served a copy of the within motion and notice in hand upon

_____
Deputy Sheriff

Fee:
Service
Travel
Total $_____

STATE OF MAINE

ss.

MAINE DISTRICT COURT

TENTH DISTRICT

DIVISION OF EASTERN YORK

Civil Docket No.

PETITION FOR
PROTECTIVE CUSTODY OF
MINOR CHILD

IN RE: Chistopher Paul Jamieson

ORDER OF CARE PENDING HEARING

After hearing,
Hearing having been waived by said parents,
The whereabouts of the parents being unknown and it appearing that the need of protective custody is of an immediate and emergency nature,

pursuant to Section 3792 of Title 22, M.R.S.A. 1964 and acts amendatory thereof and additional thereto, it is ordered that

be committed into the custody of the State of Maine Department of Health and Welfare pending hearing on the foregoing petition, and said Department is directed to make provisions for necessary care pending hearing.

Dated at_____, Maine this _____day of _____,A.D. 19____.

_____
Judge of the District Court

STATE OF MAINE

YORK, SS

MAINE DISTRICT COURT
TENTH DISTRICT
DIVISION OF
EASTERN YORK

IN RE: CHRISTOPHER PAUL JAMIESON

DECREE OF PROTECTIVE CUSTODY
OF MINOR CHILDREN

A Petition of Protective Custody having been signed by Bradley B. Ronco duly authorized agent of the State of Maine Department of Health and Welfare,

and notice of the pendency of these proceedings having been duly and seasonably given according to law, and this cause having been heard before me, and the allegations contained therein having been found to be true,

IT IS HEREBY ORDERED AND DECREED THAT Christopher Paul Jamieson minor child of Sybil Clare Jamieson, only legal living parent be and hereby is committed into the custody of the State of Maine Department of Health and Welfare, pursuant to M.R.S.A. 1964, Title 22, Section 3792.

Dated: September 23, 1971

s/George V. Varney
Judge of the Tenth District Court

CW-3

STATE OF MAINE
YORK, ss.

MAINE DISTRICT COURT
DISTRICT TENTH
DIVISION OF
EASTERN YORK
Civil Action
Docket No. 71/2-CN

DEPARTMENT OF HUMAN SERVICES } MOTION FOR REVIEW
IN RE: CHRISTOPHER PAUL JAMIESON } PURSUANT TO 22 M.R.S.A. §4038

The State of Maine Department of Human Services, by and through its attorney respectfully states that:

1. A Child Protection Order regarding the above-named child(ren) was issued by this Court on September 23, 1971.
2. The guardian ad litem in the initial proceeding was None given.
3. At the time of the protection order, this Court ordered that a review hearing be held within the following time period: None Ordered.
4. Reviews of the protection order were held on the following dates: None held.
5. To establish early permanency planning for children in foster care, recent federal legislation provides that each child in foster care should have a periodic judicial review of the disposition in the child protection proceeding. (42 U.S.C. §§670, et seq.)
6. The Department has determined that it is in the best interests of the above-named child(ren) that the Court review this matter pursuant to 22 M.R.S.A. §4038(2).

WHEREFORE, the State of Maine Department of Human Services prays that this Court:

1. Review the Child Protection Order regarding the above-listed case.
2. Appoint a guardian ad litem if none has been appointed previously.

BSSSC-077 N0383

3. After review, make the following order: Christopher to remain in the custody of the Department of Human Services.

Dated: May 2, 1983 Thomas E. Deyer

NOTICE TO PARENTS

Parents are entitled to legal counsel in these proceedings. If a parent wants an attorney but is unable to afford one, that parent should contact the Court as soon as possible to request appointed counsel.

NOTICE OF HEARING

Please take note that the State of Maine Department of Human Services will bring this Motion on for hearing before the District Court sitting in Biddeford, Maine, on June 15, 1983 at 8:30 a.m.

Guardian Ad Litem: _____
Attorney for Parent: _____
Attorney for Parents: _____

A True Copy
Attest,
Vivian M. Huley
Deputy Clerk
Date 5/15/73

STATE OF MAINE
YORK, ss

DISTRICT COURT
DISTRICT TEN
DIVISION OF
EASTERN YORK
CIVIL ACTION
DOCKET NO. _____

DEPARTMENT OF
HUMAN SERVICES }
IN RE: CHRISTOPHER } PETITION FOR CHANGE OF
JAMIESON CUSTODY & REVIEW

Now Comes Sybil Jamieson Coombs, the Mother of Christopher Jamieson and pursuant to 22 M.R.S.A. §4038, moves this Honorable Court as follows:

1. She is the natural mother of Christopher Jamieson and in September of 1971, when she was a minor child "consented" to an order of protective custody for Christopher to the State of Maine;

2. The first judicial review of that protective order was held in 1983;

3. It was in the Spring of 1983 that Mrs. Coombs learned Christopher was alive, believing him dead since 1972;

4. Mrs. Coombs has refrained from bringing this Petition until the present time based on representations by the State that alternative forms of reunification would be seriously explored and prompt psychological testing would be arranged for;

5. Mrs. Coombs has learned that the foster mother has remarried for the third time; no date has been set for psychological testing and no effort is being made to encourage reunification. Further, the State is supporting termination of her rights and adoption of Christopher;

6. Mrs. Coombs is married, has two other children who are half-siblings of Christopher's and can provide a stable, caring and loving home environment for Christopher;

7. Christopher Jamieson has the ability to integrate into his natural family.

WHEREFORE, Sybil Coombs prays this Court to order that custody of Christopher be returned to her forthwith.

Dated: June 28, 1984

Sheila J. Fine
FINE & COHEN, P.A.
Attorney for Sybil Coombs
27 Maine Street, Box 756
Ogunquit, ME 03907
646-9921

CERTIFICATION OF SERVICE

I, Sheila J. Fine, Esq., Attorney for Sybil J. Coombs in the above captioned matter, hereby certify that I have this date caused a conformed copy of the within Motion to be served upon James Eastman Smith, Thomas Geyer, William Dunn, Paul Beach, Michelle Roberts and Ronald R. Coles by depositing same in the U.S. First Class Mail, postage pre-paid, addresed as follows: James Eastman Smith, Esq., Senior Assistant Attorney General, Department of Human Services, 221 State Street, Station 11, Augusta, ME 04333; Thomas Geyer, Esq., Assistant Attorney General, Civil Division, State House Station 6, Augusta, ME 04333, William Dunn, Esq., 12 Berwick Street, P.O. Box 700, Berwick, ME 03901; Paul Beach, Esq., Daughan, Kimmel & Beach, Route 1, P.O. Box 459, Wells, ME 04090; Michelle Roberts, Esq., 311 Alfred Street, Biddeford, Maine 04005 and Ronald R. Coles, Esq., 75 Court Street, P.O. Box 143, Machias, ME 04654.

Dated: June 28, 1984

Sheila J. Fine
FINE & COHEN, P.A.
Attorney For Sybil Coombs

NOTICE OF HEARING

TO: James Eastman Smith, Esq.
Thomas Geyer, Esq.
William Dunn, Esq.
Paul Beach, Esq.
Michelle Roberts, Esq.
Ronald R. Coles, Esq.

Please take Notice that the undersigned will bring the above Motion on for hearing before this Court at the Biddeford District Court, Washington Street, Biddeford, Maine on the 20th day of July, 1984 at 9:00 A.M. or as soon thereafter as counsel may be heard.

Sheila J. Fine
FINE & COHEN, P.A.
Attorney For Sybil Coombs

STATE OF MAINE
YORK, ss

DISTRICT COURT
DISTRICT TEN
DIVISION OF
EASTERN YORK
CIVIL ACTION
DOCKET NO. 71-2-2-CN

IN RE: CHRISTOPHER
PAUL JAMIESON { NOTICE OF APPEAL

Notice is hereby given that Sybil Jamieson Coombs as a party aggrieved by the Order of Termination of her Parental Rights entered in the Maine District Court in this action on October 11, 1985 hereby appeals from said Order pursuant to 22 M.R.S.A. §4006.

Dated: October 17, 1985

Sheila J. Fine, Esq.
Attorney For Appellant
27 Main Street, P.O. Box 756
Ogunquit, Maine 03907
207-646-9921

of wedlock, not knowing the circumstances at all.
Q Okay. so you felt that you were acting in Sybil's best interests?
A I felt that I was.
Q Okay.
MR. SMITH: I have nothing else. Thank you.
CROSS EXAMINATION BY MS. FINE
Q When Mrs. Marsh called you in 1978, did you inquire whether she thought Mrs. Coombs would want to hear from the department?
A That Mrs. Coombs — I didn't hear the rest of it?
Q Might want to hear from the department? Did you ask Mrs. Marsh if her daughter might want to hear from the department about Christopher?
A No.
Q So, in 1978, you actually found out that Mrs. Coombs thought that the child was dead. Is that correct?
A Yes.
Q Is there any reason why you did not note that in your records anywhere?
A I don't know any reason why it wasn't in the records.
Q And is there any reason why you did not note the telephone call from the doctor at the genetic counseling?
A No. I did send out the reports to the doctor.
Q And that's not noted in the records, either.

A I--
Q Is it?
A Not in any records that I have. Now, I haven't seen what I thought was quite a lot of dictation that--I haven't seen.
Q Did you have a supervisor at that time?
A I believe his name was Mr. Reid. (sic.)
Q Mr. Reid? Do you recall having any conversation with Mr. Reid following this telephone call from the genetic counseling service?
A I don't recall if I did.
Q Do you recall speaking with anyone else in the department after that telephone call in which you found out, at least, some information that the natural mother might think the child was dead?
A I don't believe so.
Q Okay. So the decision not to call Mrs. Coombs after that conversation was purely your decision?
A It seems to have been. Yes.
Q You also just indicated that--you used the terms that "throughout the record, it was indicated that the family had no interest". Did the record indicate anything after 1973 of any contact with the family whatsoever?
A Not to my knowledge.
MS. FINE: I have no further questions.

IN RE DANIEL C.: REUNIFICATION EFFORTS AND THE TERMINATION OF PARENTAL RIGHTS

In *In re Daniel C.*,[1] the Maine Supreme Judicial Court, sitting as the Law Court, affirmed an order terminating a father's parental rights pursuant to title 22, section 4055 of the Maine Revised Statutes.[2] The issue on appeal concerned the effect of a failure by the Department of Human Services (DHS) to

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1. 480 A.2d 769 (Me. 1984).
2. The statute in effect when the Law Court decided *Daniel C.* stated:

> **§ 4055. Grounds for termination**
>
> **1. Grounds.** The court may order termination of parental rights if:
>
> **A.** One of the following conditions has been met:
>
> (1) Custody has been removed from the parent under:
>
> (a) Section 4035 or 4038;
>
> (b) Title 19, section 213, 214 or 752; or
>
> (c) Section 3792 prior to the effective date of this chapter; or
>
> (2) The petition has been filed as part of an adoption proceeding in Title 19, chapter 9; and
>
> **B.** Either:
>
> (1) The parent consents to the termination. Consent shall be written and voluntarily and knowingly executed in court before a judge. The judge shall explain the effects of a termination order; or
>
> (2) The court finds, based on clear and convincing evidence, that:
>
> (a) The parent is unwilling or unable to protect the child from jeopardy or has willfully abandoned the child or has refused to take responsibility for the child;
>
> (b) The circumstances are unlikely to change in a reasonable time; and
>
> (c) Termination is in the best interest of the child.
>
> **2. Consideration.** In deciding to terminate, the court shall consider the needs of the child, including the child's age, attachments to relevant persons, periods of attachments and separation and the child's ability to integrate into a substitute placement or back into his parent's home.
>
> **3. Objection by child.** The court shall not order termination if the child is at least 14 years old and objects to the termination.

ME. REV. STAT. ANN. tit. 22, § 4055 (Supp. 1983-1984), *amended by* ME. REV. STAT. ANN. tit. 22, § 4055 (Supp. 1984-1985). Section 4055 was originally enacted as part of the Child and Family Services and Child Protection Act, ch. 733, § 18, 1979 Me. Laws 2413, 2416-37 (current version at ME. REV. STAT. ANN. tit. 22, § § 4001-4071 (Supp. 1984-1985).

make efforts toward family reunification.[3] The appellant, Daniel C.'s Father, Everett C., argued that the DHS failed to make adequate reunification efforts as required by title 22, section 4041 of the Maine Revised Statutes and that this failure precluded the termination of his parental rights.[4] The Law Court agreed that section 4041 imposed a duty on the DHS to make reunification efforts[5] and that the department's efforts in regard to Daniel C. fell short of the statutory requirements.[6] Nevertheless, the court rejected the appellant's argument that the DHS's failure to make reunification efforts created grounds for denying the termination of his parental rights.[7]

The practical effect of the Law Court's decision in *In re Daniel C.* is that there is no mechanism for enforcing the reunification requirements of section 4041. Thus, the issue arises whether the court's construction of the termination statute is consistent with the Legislature's purpose in enacting the reunification provision of section 4041.[8] In addition, *Daniel C.* implicates fourteenth amendment due process concerns. The termination of parental rights is a drastic measure.[9] The United States Supreme Court has classified parental rights as a fundamental liberty interest protected by the due process clause of the fourteenth amendment.[10] Consequently, when a state seeks to terminate

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3. *In re* Daniel C., 480 A.2d at 769.

4. *Id.* The statute provided in part: "Family reunification. When a child has been ordered into the custody of the department under section 4035, it shall provide, arrange or coordinate services to facilitate the rehabilitation and reunification of the parents and child." ME. REV. STAT. ANN. tit. 22, § 4041(1) (Supp. 1983-1984), *repealed and replaced by* ME. REV. STAT. ANN. tit. 22, § 4041 (Supp. 1984-1985).

5. *In re* Daniel C., 480 A.2d at 769.

6. *Id.* at 769 & n.3.

7. *Id.* at 769-72.

8. *See infra* notes 32-43 and accompanying text.

9. Termination proceedings are the mechanism by which children become eligible for adoption over parental objections. *See* ME. REV. STAT. ANN. tit. 22, § 4056(3) (Supp. 1984-1985) (once parental rights have been terminated, the natural parent has no right to object to his child's adoption proceedings). In Maine, an order terminating parental rights divests both the parent and the child of all legal rights and duties growing out of the parent-child relationship, except for inheritance rights between the child and his natural parents. ME. REV. STAT. ANN. tit. 22, § 4056(1) (Supp. 1984-1985).

10. *See* Santosky v. Kramer, 455 U.S. 745, 753 (1982) (natural parents have fundamental liberty interest in care, custody and management of their children);

parental rights, it must provide parents with fundamentally fair procedures.[11] There is a question, therefore, whether as a matter of due process reunification efforts should be a prerequisite to the termination of parental rights.

In Maine, state intervention to protect abused or neglected children is governed by the Child and Family Services and Child Protection Act (Child Protection Act).[12] One of the Legislature's purposes in enacting the statute was to "[g]ive family rehabilitation and reunification priority as a means for protecting the welfare of children."[13] When children are ordered into the DHS's custody, section 4041 places several affirmative obligations on the department. The DHS is required to give parents notice of the child's residence and health status, to provide parents with opportunities to visit the child, and to periodically review the reasons for the child's removal, the conditions upon which the child may be returned to the parents, and the services available to assist the parents.[14] The statute does not expressly provide that the DHS's failure to carry out the above duties precludes the termination of parental rights. Under the section 4055 in effect when the Law Court decided *Daniel C.*, parental rights could be terminated upon findings that the child had been abandoned, that

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Stanley v. Illinois, 405 U.S. 645, 651-52 (1972) (state law presumption that unmarried fathers are unfit parents violates due process). *But see* Lassiter v. Department of Socal Services, 452 U.S. 18, 27 (1981) (due process does not require appointment of counsel in every proceeding to terminate parental rights); Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977) (foster parent's interest in maintaining a child's status in foster care is not a fundamental liberty interest).

The fourteenth amendment provides in relevant part: "No State shall... deprive any person of life, liberty, or property, without due process of law...." U.S. CONST. amend. XIV, § 1. *See also* ME. CONST. art. I, § 6-A.

11. Santosky v. Kramer, 455 U.S. 745, 753-54 (1982); Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981).

12. Ch. 733, § 18, 1979 Me. Laws 2413, 2416-38 (current version at ME. REV. STAT. ANN. tit. 22, § § 4001-4071 (Supp. 1984-1985)).

13. ME. REV. STAT. ANN. tit. 22, § 4003(3) (Supp. 1984-1985).

14. ME. REV. STAT. ANN. tit. 22, § 4041(1)(A), (B)(C) (Supp. 1983-1984), *repealed and replaced by* ME. REV. STAT. ANN. tit. 22, § 4041 (Supp. 1984-1985).

The new § 4041 does not make substantive changes in the reunification requirements. It reorganizes the old section, most significantly in § 4041(1). The subsection sets out in detail the elements of a reunification plan: notice requirements to keep the parents informed of their responsibilities and the condition and status of the child, the parental responsibility to help to rehabilitate

the circumstances were unlikely to change, and that termination was in the best interests of the child.[15]

Daniel C. was originally placed in the DHS's custody in 1973. At this time, his father Everett C., was incarcerated in the Maine State Prison, and his mother Patricia, was a patient at the Augusta Mental Health Institute.[16] Everett unsuccessfully sought to regain custody of Daniel in 1974.[17] While Everett was imprisoned, the DHS caseworker assigned to the case refused to arrange visits between Everett and Daniel at the prison and refused to reveal Daniel's whereabouts to Everett.[18]

The DHS petitioned to terminate Everett's parental rights in 1982.[19] The district court held an evidentiary hearing and found that the grounds for termination were established by clear and convincing evidence.[20] On appeal, Everett argued that the DHS's

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the parent-child relationship, and a provision providing for judicial review of a reunification plan. ME. REV. STAT. ANN. tit. 22, § 4041(1) (Supp. 1984-1985).

15. ME. REV. STAT. ANN. tit. 22, § 4055(1)(B)(2) (Supp. 1983-1984), *amended by* ME. REV. STAT. ANN. tit. 22, § 4055 (Supp. 1984-1985).

Section 4055 as amended adds an additional ground for termination: "The parent has failed to make a good faith effort to rehabilitate and reunify with the child pursuant to section 4041." ME. REV. STAT. ANN. tit. 22, § 4055(1)(B)(2)(b)(iv) (Supp. 1984-1985). *Compare supra* note 2.

16. *In re* Daniel C., 480 A.2d 766, 767 (Me. 1984).

17. *Id.* at 767-68. Everett filed a motion for restoration of custody. The DHS answered and moved to dismiss because Everett was not eligible for parole until May, 1976. The motion was eventually dismissed in 1978 for failure to prosecute. Patricia never sought to regain custody of Daniel. In 1974, she expressed her desire to put Daniel up for adoption, but Everett refused his consent. Patricia died in 1978. *Id.*

18. *Id.* at 767. The DHS caseworker testified that she did not give Daniel's address to Everett because Everett threatened to kidnap Daniel upon his release from prison. *Id.*

19. *Id.* at 768. Daniel C. was 11 years old at the time of the termination hearing and had been in foster care for ten years. *Id.*

20. *Id.* at 768-69. Two factors appear to have influenced the district court in making its findings. First, when Everett was released from prison for a brief period during 1976, he made no effort to contact Daniel, nor did he contact the DHS concerning Daniel's status and welfare. *Id.* at 768. Second, at the termination hearing, a psychologist testified that Daniel had developed physical and emotional problems because of anxiety over his lack of a permanent family relationship. He diagnosed Daniel's condition as anorexia nervosa, a potentially fatal disorder. He also testified that after intensive treatment and assurance that his foster parents were seeking to adopt him, Daniel's condition began to improve. *Id.*

failure to make reunification efforts constituted grounds for denying the termination of his parental rights. In support of his argument, Everett cited *In re Shannon R.*,[21] a 1983 decision of the Law Court.[22]

In *Shannon R.*, the Law Court reversed a termination order, emphasizing the DHS's failure to make reunification efforts. The lower court found that the mother had done nothing to indicate that she "'wished further consideration as to parental rights,' that [she] would not change her position . . . 'unless and until a petition for termination was filed.'"[23] The Law Court held that these findings were not established by clear and convincing evidence.[24]

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21. 461 A.2d 707 (Me. 1983). Everett also relied on *In re* Anita "PP", 65 A.D.2d 18, 410 N.Y.S.2d 916 (1978) (per curiam). The New York Supreme Court, Appellate Division in *Anita "PP"* reversed a lower court's order terminating parental rights which was based in part on a finding that the children were permanently neglected. The court found that the Otsego County Department of Social Services did not sustain its burden of proving that it had made diligent efforts to strengthen and encourage the parental relationship. *Id.* at 21-24, 410 N.Y.S.2d at 918-20. The Law Court distinguished *Anita "PP"* on the ground that it was decided under a different statutory scheme. *In re* Daniel C., 480 A.2d 766, 769-70 (Me. 1984). New York's termination statute expressly requires proof of "diligent" reunification efforts as a prerequisite to terminating parental rights. N.Y. SOC. SERV LAW § 384-b(7)(a) (McKinney 1983). Compare the Maine termination statute, quoted *supra* note 2, with the following provision from New York's termination law:

> For the purposes of this section, "permanently neglected child" shall mean a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child. In the event that the parent defaults after due notice of a proceeding to determine such neglect, such physical and financial ability of such parent may be presumed by the court.

N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 1983).

22. *In re* Daniel C., 480 A.2d 766, 769 (Me. 1984).

23. *In re* Shannon R., 461 A.2d at 713.

24. *Id.* at 712-13. The clear and convincing standard of proof is required by Maine's termination statute. ME. REV. STAT. ANN. tit. 22, § 4055(B)(2) (Supp. 1983-1984), *amended by* ME. REV. STAT. ANN. tit. 22, § 4055 (Supp. 1984-1985). In Santosky v. Kramer, 455 U.S. 745 (1982), the United States Supreme

It noted that it was possible to conclude from the record that the DHS made no reunification efforts.[25] After holding that the DHS failed to establish the grounds for termination under section 4055,[26] the court stated:

> In addition, we determine that the Department did not meet its burden with regard to reunification efforts, as required by section 4041. . . .[T]he Department must, prior to seeking termination, make the statutorily mandated effort to reunite the family. If those efforts fail, the Department must, at the termination hearing, show clearly and convincingly that it made those efforts and that the parents "definitely gave up their parental interests. . ." and that the situation is not likely to change.[27]

In *Daniel C.*, the Law Court held that *Shannon R.* did not require proof of reunification efforts as a prerequisite to termination. It based its conclusion on the fact that *Shannon R.* was decided under the termination statute, section 4055, and not under section 4041, which imposes requirements on the DHS to work toward the reunification of parents and children.[28] As to language in *Shannon R.* suggesting that the DHS did not meet its burden under section 4041, the court stated that "'[b]urden' there

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Court held that proof of the grounds for termination by clear and convincing evidence is a constitutionally mandated element of due process in termination proceedings.

25. In re Shannon R., 461 A.2d at 713, 715 n.14.

26. *Id.* at 715.

27. *Id.* 715-16 (footnote omitted).

28. *In re* Daniel C., 480 A.2d 766, 771 (Me. 1984). Section 4055 sets forth the grounds for termination of parental rights. ME. REV. STAT. ANN. tit. 22, § 4055 (Supp. 1983-1984), *amended by* ME. REV. STAT. ANN. tit. 22, § 4055 (Supp. 1984-1985). Section 4041 sets forth services which the DHS must provide on behalf of children who have been ordered into the DHS's custody to facilitate reunification with their parents. The section reads as follows:

§ **4041. Departmental responsibilities**

1. Family reunification. When a child has been ordered into the custody of the department under section 4035, it shall provide, arrange or coordinate services to facilitate the rehabilitation and reunification of the parents and child. These services shall include:

A. Giving the parents prompt written notice of the following, unless that notice would be detrimental to the best interests of the child:

(1) The child's residence and, when practicable, at least 7-days' advance written notice of a planned change of his residence; and

(2) Any serious injuries, major medical care received or hospitalization of the child;

refers to obligation, not burden of proof."[29] According to the *Daniel C.* court, reunification efforts are not a discrete element of proof in termination proceedings.[30] Instead, "at a termination hearing the department's reunification efforts will affect the [trial] court's evaluation of parental conduct in determining the existence *vel non* of the grounds for termination stated in section 4055(1)(B)(2)."[31] Although the Law Court was correct that *Shannon R.* was decided under section 4055, it disregarded the fact that the *Shannon R.* court incorporated the substantive requirements of section 4041 into its reading of section 4055.

B. Assuring that the parents have ample opportunity to visit with the child when this is not detrimental to the best interests of the child;

C. Periodically reviewing with the parents why the child was removed, what must occur for the child to be returned and the services which are available to assist them; and

D. Petitioning for judicial review and return of the child to his parents at the earliest appropriate time.

2. Discontinuation of services. The following provisions shall govern discontinuation of services.

A. The department may discontinue these efforts with either parent, if that parent:

(1) Cannot be located; or

(2) Refuses or is unable to make a good faith effort toward rehabilitation and reunification.

B. When the department discontinues efforts to return the child to a parent, it shall give written notice of this decision to that parent at his last known address. This notice shall include the specific reasons for the department's decision, the specific efforts the department has made in working with the parent and child and a statement of the parent's rights under section 4038. This notice requirement may be met by service of a copy of a petition to terminate parental rights under subchapter VI.

C. If the department discontinues efforts to return the child to a parent, but does not seek termination of parental rights, then subsection 1, paragraphs A and B, shall still apply.

ME. REV. STAT. ANN. tit. 22, § 4041 (Supp. 1983-1984), *repealed and replaced by* ME. REV. STAT. ANN. tit. 22, § 4041 (Supp. 1984-1985).

29. *In re* Daniel C., 480 A.2d 766, 771 (Me. 1980).

30. *Id.* at 770. The Law Court has followed this holding in *In re* Crystal S., 483 A.2d 1210 (Me. 1984) and *In re* Walter C., 481 A.2d 1312 (Me. 1984).

31. *In re* Daniel C., 480 A.2d 766, 771 (Me. 1984). Applying this framework to the record on appeal, the Law Court affirmed the district court's order: "The District Court made the requisite findings under section 4055 . . . . Although the District Court made no reference to reunification efforts . . . we must assume such efforts, or lack thereof, were considered." *Id.* at 772.

The *Daniel C.* court refused to require reunification efforts prior to the termination of parental rights as a matter of statutory construction. It noted that section 4041 does not state that the DHS's failure to make reunification efforts precludes the termination of parental rights.[32] Furthermore, the court reasoned, section 4055 provides detailed grounds for termination, but does not specify the DHS's compliance with section 4041 as an element of proof.[33] The court concluded: "We simply do not detect any legislative intent that the department's reunification efforts be made a *discrete* element of proof in termination proceedings."[34]

A fundamental rule of statutory construction is that courts should "determine the intent of the legislature in enacting [a statute] and give effect to that intent."[35] To ascertain legislative intent concerning a particular section of a comprehensive statute, courts should consider the entire statutory scheme.[36] The goal is to "interpret a statute 'so that all of its provisions are read in harmony and are effectuated.'"[37] Furthermore, courts should avoid a construction "which would lead to an absurd result."[38]

In enacting the Child Protection Act, the Maine Legislature gave priority to family reunification once children are taken into the DHS's custody.[39] It sought to effectuate that purpose through section 4041.[40] The Law Court's conclusion that, based on the

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32. *Id.* at 770. *See supra* text accompanying note 29.

33. *In re* Daniel C., 480 A.2d 766, 770 (Me. 1984).

34. *Id.* (emphasis in original).

35. Penobscot Nation v. Stilphen, 461 A.2d 478, 481 (Me. 1983). *See also* Eastern of Maine, Inc. v. Vintner's Group, Ltd., 455 A.2d 936, 941 (Me. 1983).

36. *See* Faucher v. City of Auburn, 465, A.2d 1120, 1124 (Me. 1983).

37. *Id.* (quoting Seven Islands Land Co. v. Maine Land Use Regulation Comm'n, 450 A.2d 475, 480 (Me. 1982).

38. Cornwall Indus., Inc. v. Maine Dep't of Manpower Affairs, Employment Sec. Comm'n, 351 A.2d 546, 553 (Me. 1976).

39. The purposes section of the Act states in part:

> Recognizing that the right to family integrity is limited by the right of children to be protected from abuse and neglect and recognizing also that uncertainty and instability are possible in extended foster home or institutional living, it is the intent of the legislature that this chapter: . . .
>
> **3. Reunification as a priority.** Give family rehabilitation and reunification priority as a means for protecting the welfare of the children.

ME. REV. STAT. ANN. tit. 22, § 4003 (Supp. 1984-1985).

40. ME. REV. STAT. ANN. tit. 22, § 4041 (Supp. 1983-1984), *repealed and replaced by* ME. REV. STAT. ANN. tit. 22, § 4041 (Supp. 1984-1985). *See supra*

express terms of sections 4041 and 4055, there was no legislative intent that reunification efforts be made a discrete element of proof fails to take into account the purpose of the entire statutory scheme.[41] In particular, the court made no attempt to effectuate the provision of section 4041.[42] Thus, it provided no remedy for the DHS's failure to make reunification efforts, and consequently, little incentive for DHS to make such efforts. The result is anomalous because it rejects the most effective means of ensuring that the DHS fulfills its duty to make reunification efforts.[43] In effect, the result makes section 4041 an empty legislative pronouncement.

The rationale favoring reunification as a policy is that if states are required to make reunification efforts prior to petitioning to terminate parental rights, state assistance could help parents overcome their problems. As a result, the drastic step of

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notes 4, 14 and accompanying text.

41. The court's reasoning that the express provisions of § 4055 should be read to exclude the provisions of § 4041 is inconsistent with an earlier articulation of the rules of statutory construction: "Whether the expression of one thing is to operate as the exclusion of another is ordinarily a question of intention, to be gathered from an examination of *all parts of a statute*. . ." City of Portland v. New England Tel. and Tel. Co., 103 Me. 240, 249, 68 A. 1040, 1043 (1907) (emphasis added). *See also* Wescott v. Allstate Ins. Co., 397 A.2d 156, 169 (Me. 1979) (the maxim *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another—is "a handy tool to be used at times in ascertaining the intent of the lawmaking body"). The intent of the Legislature in making reunification a state policy would be better served if the DHS's compliance with § 4041 is interpreted to be an additional requirement for termination of parental rights in § 4055. *See also* ME. REV. STAT. ANN. tit. 22, § 4003(3) (Supp. 1984-1985).

42. The dissenting justices stated:

> The majority focuses on section 4055 which describes the grounds for termination and, finding no express requirement in that section that the department prove it has attempted reunification, effectively ignores the directive of section 4041. It is more in accord with the express purpose of the act to view sections 4041 and 4055 as working in tandem: the department has an inescapable obligation to attempt to reunify the family, and only when these efforts have been made and have failed may the department bring its petition for termination. Only by interpreting the statutory scheme in this way can we effectuate the explicit purpose of the act, as declared in section 4003.

In re Daniel C., 480 A.2d 766, 772-3 (Me. 1984) (Violette, J., dissenting).

43. *Id.*

termination might become unnecessary.[44] Furthermore, if reunification efforts are made a prerequisite to the termination of parental rights, parental response to a reunification plan constitutes an objective basis for evaluating the suitability of individuals as parents at termination proceedings.[45]

Decisions denying the termination of parental rights for lack of reunification efforts have been criticized, however, as penalizing children to protect parental rights.[46] Courts have reasoned that reunification efforts can be detrimental to a child's welfare in cases where the only solution is the immediate termination of parental rights.[47] Nevertheless, if reunification statutes are inter-

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44. *See* State *ex rel.* Juvenile Dep't of Multnomah County, 55 Or. App. 897, 901, 640 P.2d 652, 655, *rev'd on other grounds*, 292 Or. 822, 642 P.2d 1167 (1982) (courts may conclude that termination is not warrented if the state agency fails to provide reunification services because, with assistance, parents might be able to make adjustments to provide an adequate home for their children). *See also* Jones v. Jackson County Dep't of Pub. Welfare, __ Ind. App. __, __, 436 N.E.2d 849, 853 (1982) ("One of the policies set forth in the Juvenile Code is 'to strengthen family life by assisting parents to fulfill their parental obligations. . . .'") (quoting IND. CODE ANN. § 31-6-1-1(5) (Burns 1980).

45. Thus, if a parent fails to respond to reunification efforts, the parent's lack of interest in regaining custody may indicate that termination is in the best interest of the child. *Cf. In re* Maricopa County Juvenile Action, 134 Arix. 407, 409, 656 P.2d 1268, 1270 (1982) (while the state is required to attempt to preserve the parent-child relationship, at some point the trial court must determine whether the parent is making a good faith effort to reunite the family). The version of § 4041, which controlled the *Daniel C.* case, contained a provision reflecting a similar policy concern. The DHS may discontinue reunification services of the parent "[r]efuses or is unable to make a good faith effort toward rehabilitation and reunification." ME. REV. STAT. ANN. tit. 22, § 4041(2)(A)(2) (Supp. 1983-1984), *repealed and replaced by* ME. REV. STAT. ANN. tit. 22, § 4041 (Supp. 1984-1985). In addition, the version of Maine's termination statute which succeeded that controlling the *Daniel C.* case makes a parent's failure "to make a good faith effort to rehabilitate and reunify with the child pursuant to seciton 4041" an alternative ground for terminating parental rights. ME. REV. STAT. ANN. tit. 22, § 4055(1)(B)(2)(b)(iv) (Supp. 1984-1985), *repealing and replacing* ME. REV. STAT. ANN. tit. 22, § 4055 (Supp. 1983-1984).

46. *See* Wald, *State Intervention on behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 682 (1976).

47. An example of circumstances warranting the immediate termination of parental rights is found in *In re* T.L.J., 303 N.W.2d 800 (S.D. 1981). In that case,

preted flexibly they can allow for cases where a child's welfare is endangered and still provide protection to parental rights.[48] Thus, reunification efforts may not be mandatory in the sense that they must be made in every case. Rather, if termination of parental rights requires proof of reunification efforts and the state does not make reunification efforts, a court could require the state to prove that the circumstances justified that decision.[49]

Had the Law Court construed section 4055 to require reunification efforts as a discrete element of proof, it might have refused to terminate Everett's parental rights. The court recognized that the DHS's reunification efforts were inadequate.[50] The caseworker was unsuccessful in arranging a visit between Everett and Daniel outside the prison, refused to allow Daniel to visit

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the South Dakota Supreme Court held that where the nature of the child's burns indicated that the child had been immersed in boiling water, his immediate need for a suitable home warranted the termination of parental rights. *Id.* at 807.

In *In re* B.E., 287 N.W.2d 91 (S.D.1979), the South Dakota Supreme Court stated:

> We must be mindful of the fact that the needs of the child must take priority over the wishes of the parent. To mandatorily impose a less restrictive alternative in each instance as a prerequisite for termination would thwart this underlying principle in cases where immediate termination is the only viable means to insure that the best interests of the child are protected.

Id. at 95.

48. For example, the New York statute requires proof of reunification efforts prior to the termination of parental rights. N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 1983). *See supra* note 21. New York case law, however, recognizes that extraordinary circumstances may excuse state runification efforts. *See In re* Andress, 93 Misc. 2d 399, 404, 402 N.Y.S.2d 743, 747 (1978), *aff'd sub nom. In re* Donna Dorene "G", 70 A.D.2d 188, 420 N.Y.S.2d 576 (1979) (prolonged residence of the child in foster care and inadequate planning for the return of the child on the part of the parents present extraordinary circumstances that excuse the state from making reunification efforts).

In Rhode Island, proof of reunification efforts is not required if the petition for termination alleges that the child has been abandoned. R.I. GEN. LAWS § 15-7-7 (Supp. 1984) (abandonment is defined as no contact between the parent and child for more than six months). Washington's Supreme Court has suggested that reunification efforts do not have to proved when "[t]he offering of services . . . would have been a futile act." *In re* Aschauer, 93 Wash. 2d 689, 699, n.6, 611 P.2d 1245, 1251 n.6 (1980).

49. *See In re* Andress, 93 Misc. 2d 399, 404, 402 N.Y.S.2d 743, 746 (1978), *aff'd sub nom. In re* Donna Dorene "G", 70 A.D.2d 188, 420 N.Y.S.2d 576 (1979).

50. *In re* Daniel C., 480 A.2d 766, 769 n.3 (Me. 1984).

Everett at the prison, and refused to reveal Daniel's whereabouts to Everett.[51] Under these circumstances, the DHS could not argue that reunification efforts were not made because Everett showed no interest in maintaining a relationship with his son. The department, through its own actions, was partially responsible for Everett's inability to maintain a relationship with his son.[52]

The court in *Daniel C.* rejected the contention that, by not requiring proof of reunification efforts, its construction of the Child Protection Act violated due process. The Law Court recognized that its decision in *Shannon R.*, emphasizing the DHS's responsibilities,[53] and the United States Supreme Court's

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51. *Id.* at 767, 769 n.3.

52. Nevertheless, on the facts before it, the Law Court's affirmance of the abandonment finding might have been proper. The facts suggest that Everett failed to make a good faith effort to fulfill his parental obligations. As the Law Court noted, the most damaging evidence against Everett at the termination hearing was his failure, during the one period when he was released from prison, to contact Daniel or the DHS concerning his son's welfare and status. *Id.* at 769. The implication is that if Everett was really interested in regaining custody of his son, he would have at least contacted the DHS to inquire about Daniel's status.

Everett's failure to contact the DHS might represent intent to forgo parental duties and could constitute abandonment under the terms of the Child Protection Act. *See* ME. REV. STAT. ANN. tit. 22, § 4002(1-A) (Supp. 1983-1984), *amended by* ME. REV. STAT. ANN. tit. 22, § 4002 (Supp. 1984-1985). This provision defines abandonment as "intent to forgo parental duties or relinquish parental claims." The requisite intent may be evidenced by "failure, for a period of at least one year, to communicate meaningfully with child; or, maintain regular visitation with the child." ME. REV. STAT. ANN. tit. 22, § 4001(1-A)(A)-(B) (Supp. 1983-1984), *amended by* ME. REV. STAT. ANN. tit. 22, § 4001 (Supp. 1984-1985). Hence, Everett's failure to contact Daniel might constitute abandonment. The inadequacy of the DHS's reunification efforts would not excuse Everett's arguable abandonment of his son.

53. As Justice Violette noted in his dissent in *Daniel C.*, the *Shannon R.* court stated:

> We recognize the difficult tasks that confront the Department. Considering, however, the extraordinary nature of a termination of parental rights, *the Department must, prior to seeking ermination, make the statutorily madated effort to reunite the family.* If those efforts fail, *the Department must*, at the termination hearing, *show clearly and convincingly that it has made those efforts* and that the parents "definitely gave up their parental interests . . . " and that the situation is not likely to change.

In re Daniel C., 480 A.2d 766, 773 (Me. 1984) (Violette, J., dissenting) (quoting *In re* Shannon R., 461 A.2d 707, 715-16 (Me. 1983) (emphasis in original).

decision in *Santosky v. Kramer*[54] brought a constitutional dimension to the case concerning whether due process requires proof of reunification efforts prior to the termination of parental rights.[55] The Law Court interpreted *Santosky* as treating the particular grounds of termination proceedings as a matter of state law, and thus not requiring specific elements, such as reunification efforts, to be mandatory in every state.[56] The court did recognize, however, that "implicit in *Santosky* is the principle that states are not free to eliminate an essential showing of parental abandonment."[57] *Santosky* stated that at a termination proceeding, "[v]ictory by the State . . . entails a judicial determination that the parents are unfit to raise their own children."[58]

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54. 455 U.S. 745 (1982) (5-4 decision). In *Santosky*, the Supreme Court held that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." *Id.* at 747-48. *Santosky* involved New York's parental rights termination procedure. A family court judge found that although the state made diligent efforts to strengthen the parental relationship, as *required* by New York's termination statute, the Santoskys were incapable of planning for the future of their children. At a disponsitional hearing, he ordered the termination of the Santosky's parental rights. The Santoskys appealed, attacking New York's fair preponderance of the evidence standard of proof. *Id.* at 751-52. *See* N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 1983).

55. *In re* Daniel C., 480 A.2d 766, 770 (Me. 1984).

56. *Id.* at 771. Admitting that the *Santosky* decision did not specifically say so, the Law Court inferred from the Supreme Court's decision an affirmation of the states' continuing ability to select the grounds for termination so long as the elements required are proved by clear and convincing evidence. *Id.*

Jurisdictions have split on the issue of whether reunification efforts should be required as a matter of statutory construction. For example, Virginia and New Hampshire courts have construed their respective termination statutes as requiring proof of reunification efforts. *See* Weaver v. Roanoke Dep't of Human Resources, 220 V. 921, 265 S.E.2d 692 (1980) (termination statute should be interpreted consistently with the objective of preserving the parent-child relationship); State v. Robert H., 393 A.2d 1387, 1390-91 (N.H. 1978) (state must make reunification efforts prior to petitioning to terminate parental rights). Pennsylvania's Supreme Court has refused to construe its termination statute in this manner. *See In re* I.R.A., 487, Pa. 563, 567-68, 410 A.2d 755, 757 (1980) ("We see no basis for reading into [the statute] a legislative intent that offering rehabilitative services to parents be a prerequisite to petitioning for termination.").

57. *In re* Daniel C., 480 A.2d 766, 771 n.4 (Me. 1984).

58. Santosky v. Kramer, 455 U.S. 745, 760 (1982). *See also* Quilloin v. Walcott, 434 U.S. 246 (1978). In *Quilloin*, the Supreme Court stated:

The due process problem raised by *Daniel C.* concerns the Law Court's affirmance of the district court's finding of abandonment. The Law Court acknowledged that because Everett was incarcerated, a finding of abandonment could not focus on the parent's responsibility to provide physical care and support for the child.[59] Instead, the court stated that its analysis would focus on the parent's responsibility to maintain a nurturing parent-child relationship.[60] It proceeded to evaluate the facts of separation, Everett's failure to maintain contact with Daniel, Daniel's close relationship with his foster family, and his lack of any relationship with Everett.[61] The court concluded that the district court's finding of abandonment was not in error.[62]

The problem with this holding is that the court's analysis rests more on factors relevant to the child's welfare rather than the judicial determination of parental fitness required by *Santosky*.[63] The DHS caseworker hindered Everett's efforts to maintain contact with Daniel. Furthermore, the caseworker never told Daniel about his father or that he was a prisoner.[64] Thus, it is not

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> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the child's best interest."

Id. at 255 (quoting Smith v. Organization of Foster Families, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)).

59. *In re* Daniel C., 480 A.2d 766, 768-69 (Me. 1984).

60. *Id.* at 769.

61. *Id.*

62. *Id.*

63. The court stated: "The District Court could have concluded that for Everett to establish a nurturing relationship would involve a very long-term process. In view of Everett's past neglect, the court was justified in believing that 'the circumstances are unlikely to change in a reasonable time.'" *Id.*

64. *Id.* at 767. The fact that the caseworker hindered Everett's ability to fulfill his parental responsibilities might constitute a deprivation of due process as well. *See In re* Christopher H., 577 P.2d 1292, 1295 (Okla. 1978). The facts of *Christopher H.* are similar to those in *Daniel C.* on this point. There, Oklahoma sought to show that the mother failed to provide proper medical care for her son, based on her failure to have her child's stitches removed in a timely manner. The evidence established that the social worker in the case misled the mother on the availability of transportation to a local medical clinic, and the mother did not have the means to take the child to the clinic on her own. As a result, the court held the termination unjustifiable because the agent who had a duty to

surprising that Daniel had no relationship with his father while he developed a close relationship with his foster parents. In assessing whether due process has been accorded to a parent in termination proceedings, the fact that interests of the child may be affected by a decision does not justify depriving parents of their due process rights.[65] A finding of unfitness cannot be predicated on the best interests of the child.[66] *Daniel C.* creates the risk that parental rights may be terminated without a proper evaluation of parental fitness.[67] Requiring reunification efforts would help ensure that

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rehabilitate the family relationship contributed to the problems on which the petition for termination was grounded *Id.*

It is ironic that the court in *Daniel C.* held that Everett failed to maintain a nurturing parent-child relationship with Daniel, while at the same time acknowledging that, through DHS's interventiuon, Everett had been denied opportunities to visit his son, did not know of his son's whereabouts, and hence, was not afforded an opportunity to develop a relationship with Daniel. *In re* Daniel C., 480 A.2d 766, 769 n.3 (Me. 1984).

Justice Nichols, who joined Justice Violette's dissent in *Daniel C.*, apparently has strong feelings on this point. In *In re* Crystal S., 483 A.2d 1210 (Me. 1984) (following the holding of *Daniel C.*). Justic Nichol's opinion for the court stated: "In contrast to *Daniel C.*, however, there is no indication on this record that the [DHS] either withheld information from the mother concerning her children's whereabouts or in any way prevented her from exercising her visitation rights." *Id.* at 1212.

65. Santosky v. Kramer, 455 U.S. 745, 754 n.7 (1982). *Santosky* may be interpreted as rejecting the idea that courts may terminate parental rights based solely on the best interests of the child. The Court stated:

> The fact that important liberty interests of the child and its foster parents may also be affected by a permanent neglect proceeding does not justify denying the *natural parents* constitutionally adequate procedures. Nor can the State refuse to provide natural parents adequate procedural safeguards on the ground that the family unit already has broken down; that is the very issue the permanent neglect proceeding is meant to decide.

Id. (emphasis in original).

The *Santosky* Court noted that imprecise substantive standards creating the grounds for termination left termination decisions unusually open to the subjective values of judges. *Id.* at 762. The Court held that due process required proof of the grounds for termination by clear and convincing evidence. *Id.* at 769-70. The Court imposed this requirement in part to force states to establish sufficient proof of their allegations rather than allow decisions to be made based solely on a child's best interests as defined by judges. *Id.* at 769.

66. *Id.* at 754 n.7.

67. *See supra* note 65.

parental fitness is evaluated at termination proceedings.[68] If a

68. Justice Violette pointed out in *Daniel C.* that frequently it is unrealistic to expect families to be reunited without the DHS's assistance. He stated:

> A high percentage of cases where the State has been awarded protective custody under section 4035 involve single parent family units, generally economically disadvantaged and supported in some degree by public assistance. The parent or parents often suffer from either a physical or mental health problem. In such cases it would be extremely difficult, if not impossible, for the parent or parents to achieve an environment suitable for the return of custody of their children without the department arranging and coordinating a meaningful program of couselling and assistance. If relieved of the obligation of proving to the court that it has made the effort to rehabilitate and reunify the family unit or that it is incapable of doing so for the reasons set forth in section 4041(2)(A), the department could in effect thwart the clearly expressed legislative policy of preserving the viability of the family unit whenever possible. The department could, by adopting a policy of doing nothing and letting nature run its course, create the inexorable result that the majority of these cases would end in the termination of parental rights.

In re Daniel C., 480 A.2d 766, 773 (Me. 1984) (Violette, J., dissenting).

This Note examines whether reunification efforts should be a prerequisite to the termination of parental rights as a matter of procedural rather than substantive due process. *Santosky* called for a showing of parental unfitness to terminate parental rights as a matter of substantive law, but did not speculate on the substantive elements that would constitute parental unfitness. *See* Santosky v. Kramer, 455 U.S. 745, 760 (1982). This Note does not advocate requiring reunification efforts prior to the termination of parental rights as a matter of substantive due process. Instead, this Note argues that the Law Court's decision in *Daniel C.*, fails to meet the requirements of procedural due process because it does not require the state to provide what may be the best evidence on the question of parental unfitness—the parent's response to state sponsored reunification efforts. *See supra* notes 60-67 and accompanying text. Procedural due process seeks to afford fair adjudication by minimizing the risk of erroneous decisions. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976). By not requiring reunification efforts, the *Daniel C.* decision creates a risk that parental rights might be terminated erroneously.

The Law Court should require the state to make reunification efforts, absent unusual circumstances, as a means of generating evidence on the question of parental fitness and thereby reducing the risk of erroneous determinations. Reunification efforts should be used as a procedural safeguard to ensure accurate adjudication of the "ordinary" case. Under this analysis circumstances could arise, as in a case of abuse, in which danger to the child along with obvious evidence of parental unfitness would negate the need for reunification efforts as a procedural safeguard. Thus, by requiring reunification efforts as a procedural safeguard rather than as a discrete element of termination, the argument rejected in *Daniel C. see supra* text accompanying note 30, the Law Court could

parent fails to respond to reunification efforts adequately, evidence on the issue of abandonment is established. The nature of any response would indicate whether a parent was taking his parental responsibility seriously.

When an individual faces deprivation of a right, such as the liberty interest of a parent in the care and custody of his children, due process requires adequate procedural safeguards to insure that individual rights receive constitutional protection.[69] While a state may have its own procedures to establish the preconditions to adverse state action which it believes provide adequate protection to individual rights, minimum requirements of procedural due process are mandated by the federal Constitution.[70] In *Mathews v. Eldridge*,[71] the United States Supreme Court required consideration of three factors in determining whether administrative procedures afforded sufficient constitutional protection:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[72]

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adopt the stance of other courts that reunification efforts are required unless extreme circumstances justify dispensing with them. *See In re* Andress, 93 Misc. 2d 399, 402 N.Y.S.2d 743 (1978) (extraordinary circumstances excuse state from making normally required reunification efforts), *aff'd sub nom. In re* Donna Dorene "G", 70 A.D.2d 188, 420 N.Y.S.2d 576 (1979). *See also In re* Aschauer, 93 Wash. 2d 689, 699 n.6, 611 P.2d 1245, 1251 n.6 (1980) (requirements of reunification efforts need not be satisfied where evidence demonstrates that such efforts would have been futile).

69. Santosky v. Kramer, 455 U.S. 745, 753-54 (1982). *See also* Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

70. Santosky v. Kramer, 455 U.S. 745, 755 (1982). The Court stated: "The 'minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.'" *Id.* (quoting Vitek v. Jones, 445 U.S. 480, 491 (1980)).

71. 424 U.S. 319 (1976) (a recipient of disability benefits under the Social Security Act is not entitled to a hearing prior to the termination of those benefits under the due process clause).

72. *Id.* at 335. The Eldridge test was derived by drawing together factors deemed important to the Court in prior decisions and placing them in one analysis. *Cf.* Cafeteria & Restaurant Workers Union, Local 743 v. McElroy, 367 U.S. 886, 895 (1961) (requiring consideration of two factors: the nature of the

Under *Eldridge*, analysis of a private interest such as parental rights turns on the degree of potential deprivation that might be created by adverse state action.[73] When a state seeks to terminate parental rights, it attempts to end, not merely impinge upon, a fundamental liberty interest.[74] A parent's interest in the care and

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government function and that of the private interest affected). For a critique of the Eldridge balancing test, see Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI L. REV. 28 (1976) (Mashaw argues that the utilitarian focus of the Eldridge balance leads to an incomplete inquiry because it is unresponsive to the full range of concerns represented in the due process clause).

In Lassiter v. Department of Social Services, 452 U.S. 18 (1981), the Supreme Court added a second level of inquiry to the Eldridge three-factor balancing test. Prior to applying the Eldridge test, the Court in *Lassiter* analyzed its precedents on the issue at stake, the right to court-appointed counsel, and raised a rebuttable presumption that counsel need only be appointed in cases where an individual faces the loss of physical liberty. *Id.* at 25-27.

Lassiter involved the right to court-appointed counsel in the context of parental rights termination proceedings. The Court held that appointment of counsel should be left to the discretion of trial courts. Its determination was made by weighing the quantum of need for procedural protections against a presumption that there is no right to appointed counsel in termination proceedings. *Id.* at 31-32.

The Lassiter test combined a presumption and a due process analysis from two descrete lines of precedent: the right to court-appointed counsel and procedural due process. The rebuttable presumption approach of *Lassiter* has implications for how the Court might decide a case concerning the issue of making reunification efforts a prerequisite for terminating parental rights. Specifically, some members of the Court might argue that there is a presumption against such a requirement, because the termination of parental rights is a facet of family law, and family law has traditionally been a matter of state law. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting) (family law is an area that "has been left to the States from time immemorial, and not without good reason").

In *Santosky*, however, the Court held that due process requires states to prove specific allegations in termination proceedings by clear and convincing evidence. *Id.* at 767. The *Santosky* Court rejected the use of a presumption in its analysis because the Court had never employed a presumption in determining the constitutionality of a standard of proof. *Id.* at 754-56. Thus, *Santosky* indicates the Court's willingness to consider the constitutionality of state procedures which adversely affect parental rights through a straightforward analysis of the Eldridge factors.

73. Mathews v. Eldridge, 424 U.S. 319, 341 (1976).

74. *See* Santosky v. Kramer, 455 U.S. 745, 753 (1982); Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981); Smith v. Organization of

custody of his children "warrants deference and, absent a powerful countervailing interest, protection."[75] Thus, the parental interest in termination proceedings has been characterized as "commanding,"[76] and merits a high level of procedural protection.

The second *Eldridge* factor is the risk of an erroneous deprivation of the private interest through the procedures used, and the safeguards that additional procedures would provide.[77] The specific risk created by the Law Court's decision in *Daniel C.* is that a finding of abandonment might rest on an analysis of factors that are not the best indication of parental unfitness. Under Maine law as construed in *Daniel C.*, termination can be ordered without a complete inquiry into the parent's desire and ability to maintain a parent-child relationship.[78]

This risk could be reduced by requiring proof of reunification efforts as a prerequisite to the termination of parental rights. Such proof would require the DHS to establish the extent of its efforts to facilitate reunification. Reunification, however, also requires that parents make a good faith effort to reunite with their families.[79] Reunification involves interaction between parents and the state in attempting to overcome the problems that led to the initial deprivation of custody. Therefore, because parents must take advantage of reunification services, evidence is created on the issue of parental fitness. Parental response to state reunification efforts provides an objective basis for making a determination either of parental fitness or, if there is an inadequate parental response, or abandonment.

Foster Families, 431 U.S. 816, 845 (1977).

75. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

76. Santosky v. Kramer, 455 U.S. 745, 758 (1982); Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981).

77. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

78. The Law Court never inquired into whether Everett could have established a meaningful relationship with his son had the DHS encouraged such a relationship. It merely stated that Everett had no relationship with his son, and in its analysis gave no weight to the fact that the DHS hindered Everett's ability to establish such a relationship. *In re* Daniel C., 480 A.2d 766, 769 n.3 (Me. 1984). It should be noted, however, that the Law Court never actually considered whether Everett was an unfit parent. It merely held that the district court had not erred in its finding of abandonment. *Id.* at 772.

79. *See* ME. REV. STAT. ANN. tit. 22, § 4041(2)(a)(2) (Supp. 1983-1984), *repealed and replaced by* ME. REV. STAT. ANN. tit. 22, § 4041 (Supp. 1984-1985).

The third *Eldridge* factor is the state interest.[80] Analysis of the state interest involves consideration of the state's function and the fiscal and administrative burdens that additional safeguards would entail.[81] Functionally, it is often in the state's interest to pursue reunification efforts. When a state seeks to terminate parental rights it acts under its authority as *parens patriae*.[82] Its role is to protect the welfare of children.[83] Maine law recognizes that an important means of protecting the welfare of children is to attempt family reunification.[84] When children are placed in the DHS's custody, the department has a duty to provide reunification services to the natural parents.[85] Requiring proof of reunification efforts would not conflict with the state's functional role in termination proceedings. In fact, such proof may further the state's goals by demonstrating that the state had carried out its obligation to protect the welfare of a child.

It is doubtful that requiring proof of reunification efforts would impose substantial fiscal and administrative burdens on the state.[86] The state is already required to make reunification efforts regardless of whether such efforts are a prerequisite to termi-

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80. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). *See supra* text accompanying note 72.

81. Mathews v. Eldridge, 424, U.S. 319, 335 (1976).

82. *Parens patriae* means "parent of the country" and refers to the role of the state as sovereign and guardian of persons under legal disability. It is used to protect quasi-sovereign interests such as health, comfort, and welfare of the people. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). Examples of the assertion of *parens patriae* authority may be seen in Wisconsin v. Yoder, 406 U.S. 205 (1972) (action to require secondary education for children over parental objections); and Prince v. Massachusetts, 321 U.S 158 (1943) (legislation prohibiting street preaching by children).

83. *Cf.* ME. REV. STAT. ANN. tit. 22, § 4003(3) (Supp. 1983-1984). *See also infra* note 87.

84. ME. REV. STAT. ANN. tit. 22, § 4003(3) (Supp. 1984-1985). *See also* Parham v. J.R., 442 U.S. 584, 602 (1979) (historically, the law has recognized that "natural bonds of affection lead parents to act in the best interests of the child").

85. ME. REV. STAT. ANN. tit. 22, § 4041(1) (Supp. 1983-1984), *repealed and replaced by* ME. REV. STAT. ANN. tit. 22, § 4041 (Supp. 1984-1985).

86. Financial cost alone is not a controlling factor in determining whether due process requires a particular safeguard. At some point, however, the benefits of a safeguard may be outweighed by financial cost. Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

nation proceedings.[87] In *Daniel C.*, the Law Court emphasized that it did not "condone any disregard of the department's obligation to facilitate reunification."[88] In proving that reunification efforts were made, the DHS would merely be establishing its compliance with section 4041.[89]

In termination proceedings, the private interest affected is a fundamental liberty, and the impingement upon that interest is complete. The Law Court's decision in *Daniel C.* creates a risk of erroneous deprivation of the private interest because in some cases parental rights can be terminated without consideratoin of the most probative evidence on parental unfitness. This risk can be alleviated by requiring proof of reunification efforts prior to the termination of parental rights. The administrative burden created by requiring proof of reunification efforts would be comparatively slight. Thus, the logical conclusion of an assessment of the *Eldridge* factors is that reunification efforts should be a prerequisite to the termination of parental rights.[90]

In contrast, *Daniel C.*'s approach to family reunification does not adequately safeguard parental rights. After *Daniel C.*, reunification efforts play a limited role in determining whether the state has established the grounds for termination under section 4055. Moreover, the decision leads to an anomalous result because it provides no mechanism for the enforcement of the DHS's obligation to make reunification efforts, and hence, little incentive for the DHS to comply with the statute. Given the fundamental importance of parental rights and the emphasis that the Child Protection Act places on family reunification, the Law Court should reconsider its conclusion that reunification efforts are not a prerequisite to the termination of parental rights.

James W. Claus

---

87. ME. REV. STAT. ANN. tit. 22, § 4041(1)(Supp. 1983-1984), *repealed and replaced by* ME. REV. STAT. ANN. tit. 22, § 4041 (Supp. 1984-1985).

88. *In re* Daniel C., 480 A.2d 766, 770 (Me. 1984).

89. As Justice Violette noted, proof of reunification efforts should not be a burden avoided by the state. "The breakup of the family unit should. . . be a last resort, when all else has failed." *Id.* at 773 (Violette, J., dissenting).

90. This due process analysis focuses on the rights of parents. An alternative measure that could facilitate the adoption of children in foster care is an open adoption procedure. Open adoption consists of an agreement allowing adopted children to maintain contact with members of the natural family following the

termination of parental rights. Amadio & Deutsch, *Open Adoption: Allowing Adopted Children to "Stay in Touch" with Blood Relatives*, 22 J. FAM. L. 59, 60 (1983). The termination of parental rights is a major barrier to the adoption of children in foster care because, once parental rights are terminated, the natural parent has no right to maintain contact with the child. *Id.* at 82. Advocates of open adoption suggest that parents would be less likely to contest petitions to terminate their parental rights if they knew that, following adoption, they could preserve meaningful relationships with their children. *Id.*

STATE OF MAINE

YORK SS

MAINE DISTRICT COURT
TENTH DISTRICT
DIVISION OF EASTERN YORK

IN RE

CHRISTOPHER PAUL JAMIESON

PETITION FOR PROTECTIVE CUSTODY OF MINOR CHILDREN

The State of Maine Department of Health and Welfare, by its duly authorized agent, Bradley B. Ronco, represents as follows:

1 Sybil Clare Jamieson of Wells in the County of York

and State of Maine is the only legal living parent of the following minor child:

Christopher Paul Jamieson born August 20, 19 71 at Biddeford, Maine

_____ born _____, 19____ at _____

_____ born _____, 19____ at _____

_____ born _____, 19____ at _____

_____ born _____, 19____ at _____

_____ born _____, 19____ at _____

_____ born _____, 19____ at _____

_____ born _____, 19____ at _____

2 Said minor child is now living in Wells, Maine

3 Said minor child is living in circumstances which are seriously jeopardizing its health, welfare or morals, and said minor child is in need of protective custody of an immediate and emergency nature.

WHEREFORE, the said petitioner prays as follows:

1 That the Court fix a time for hearing of this petition and order notice thereof to the parent of said child.

2 That after hearing suitable and proper provision be ordered by the Court for the care, custody, support and education of said child in accordance with the provisions of Section 3792 of title 22, M.R.S.A. 1964 and acts amendatory thereof and additional thereto.

Dated at Saco, Maine this 23rd day of September A.D. 1971.

STATE OF MAINE DEPARTMENT OF HEALTH AND WELFARE

By s/ Bradley B. Ronco
Its duly authorized agent

ORDER OF HEARING AND NOTICE

STATE OF MAINE

YORK SS

MAINE DISTRICT COURT
TENTH DISTRICT
DIVISION OF EASTERN YORK

On the foregoing petition, hearing is ordered at the Tenth

District Court Room in Saco in said County of

York on the 23rd day of September

A.D. 1971 at nine o'clock in the fore noon, and it is further

ordered that Sybil Clare Jamieson, the only legal living parent of said child be notified of the pendency of these proceedings by being served in hand with a copy of the Petition at least ten (10) days prior to the hearing date, that the/ (she) may then and there appear and be heard.

Notice of service and hearing is hereby waived.

s/ George D. Varney
Judge of Tenth District Court

Signed: _____

PROOF OF SERVICE

COPY

_____

On the _____ day of _____, A.D. 19____ I served a copy of the within motion and notice in hand upon

_____
Deputy Sheriff

Fee:
Service:
Travel:
_____
Total $

STATE OF MAINE
ss
MAINE DISTRICT COURT
TENTH DISTRICT
DIVISION OF EASTERN YORK
Civil Docket No.
PETITION FOR
PROTECTIVE CUSTODY OF
MINOR CHILD

IN RE CHRISTOPHER PAUL JAMIESON

ORDER OF CARE PENDING HEARING

After hearing
Hearing having been waived by said parents.
The whereabouts of the parents being unknown and it appearing that the need of protective custody is of an immediate and emergency nature,
pursuant to Section 3792 of Title 22, M.R.S.A. 1964 and acts amendatory thereof and additional thereto, it is ordered that

be committed into the custody of the State of Maine Department of Health and Welfare pending hearing on the foregoing petition, and said Department is directed to make provisions for necessary care pending hearing.

Dated at _____ Maine this _____ day of

_____, A.D. 19____

_____
Judge of the District Court

STATE OF MAINE

YORK SS

MAINE DISTRICT COURT
TENTH DISTRICT
DIVISION OF EASTERN YORK

IN RE

CHRISTOPHER PAUL JAMIESON

DECREE OF PROTECTIVE CUSTODY OF MINOR CHILDREN

A Petition for Protective Custody having been signed by Bradley B. Ronco duly authorized agent of the State of Maine Department of Health and Welfare.

and notice of the pendency of these proceedings having been duly and seasonably given according to law, and this cause having been heard before me, and the allegations contained therein having been found to be true.

IT IS HEREBY ORDERED AND DECREED that Christopher Paul Jamieson

minor child of Sybil Clare Jamieson, only legal living parent be and hereby is committed into the custody of the State of Maine Department of Health and Welfare pursuant to M.R.S.A. 1964, Title 22, Section 3792.

Dated September 23 '71

Judge of the Tenth District Court

Supreme Court, U.S.
FILED
FEB 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-991

In The

Supreme Court of the United States

October Term, 1986

IN RE: CHRISTOPHER J.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 12, 1987

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STATEMENT OF THE CASE

Petitioner seeks to overturn a decision of the Maine Supreme Judicial Court (hereinafter the Maine Supreme Court) affirming an order of the trial court terminating the Petitioner's parental rights to her son Christopher J. *See In Re: Christopher J.*, 505 A.2d 795 (Me. 1986). The unique facts in this matter are concisely set forth in the introduction of the Maine Supreme Court's opinion:

> Christopher was born on August 20, 1971, to Sybil [Petitioner], then a 15-year-old unwed high school student. Sybil and her family decided that adoption was in the best interest of the baby. Soon after his birth, however, it became apparent that Christopher had serious medical problems that would prevent his immediate adoption. Therefore, on September 23, 1971, Sybil voluntarily placed Christopher in the protective custody of the Maine Department of Health and Welfare, now renamed the Department of Human Services (Department).
>
> The Department placed Christopher in the foster care of Mrs. M. when he was 11 weeks old. He has remained in her home continuously to the present, and she wishes to adopt him. Christopher has a liver condition called Alpha I Anti-Trypsin Deficiency, which has led to cirrhosis of the liver and has required him to undergo a series of surgeries and hospitalizations. At the time the District Court entered its order on October 11, 1985, Christopher was waiting for an urgently needed liver transplant. Mrs. M. has cared for Christopher throughout all these physical difficulties. When Christopher was one year old, she told the Department that she wished to adopt him, and repeated that request several times thereafter. Mrs. M.'s income, however, was insufficient to pay for Christopher's extraordinary medical expenses, and it was not until March of 1984 that the Department had

> the funds available to provide for a subsidized adoption pursuant to 19 M.R.S.A. § 541 (Supp. 1985-1986). For that reason Christopher has remained in Mrs. M.'s foster care for over 14 years.
>
> Sybil has had no contact with Christopher since he was an infant. When he was two years old he became seriously ill and was expected to die. Believing that she was acting in Sybil's best interest, Sybil's mother told her that Christopher had died. Sybil remained under the impression that Christopher was dead until the Department contacted her on May 2, 1983, regarding a new federally required judicial review of Christopher's foster care. The Department had never attempted to contact Sybil before that time. Sybil immediately told the Department that she wanted to meet Christopher. However, because of Christopher's physical and mental condition, his doctors advised against such a meeting. Sybil complied with their recommendation. On July 2, 1984, she filed a petition for change of custody in District Court.
>
> In June 1985 the Department petitioned for termination of Sybil's parental rights pursuant to 22 M.R.S.A. § 4055 so that Christopher could be adopted by Mrs. M.

In Re: Christopher J., 505 A.2d at 796.

As described above, following the Department's renewed contact with Sybil in 1983,[1] she requested a meeting

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1. It was not until 1983 and the enactment of Maine P.L. 1983, Ch. 185, amending section 4038 of the Child and Family Services and Child Protection Act, 22 M.R.S.A. §§ 4001-4086 (Supp. 1985-1986) requiring periodic judicial reviews of the circumstances of *all* children placed in the Department's custody, that the Department came under any legal obligation to recontact Sybil. Prior to 1983, section 4038 provided that no such review was required in the case of a child who, like Christopher, had been placed under the Department's custody pursuant to former section 3792 prior to April 3, 1980.

with Christopher and eventually petitioned to regain custody of him. Christopher's extremely precarious physical condition led the parties to agree to a series of psychological and physical evaluations of Christopher to determine whether such a meeting or shift in custody could be achieved without harming him. *Id.* Those professionals ultimately concluded not only that contact between Christopher and Sybil would be extremenly harmful to him, but also that Christopher should be freed for adoption by Mrs. M. as soon as possible. *Id.* at 798-800.

In affirming the lower court's termination of the Petitioner's parental rights, the Maine Supreme Court extensively referrred to and quoted from the findings of the professionals. *See, e.g., id.* at 798. They included the assistant clinical director of the Department of Psychiatry at the Judge Baker Guidance Center, Dr. David DeMaso; a psychiatrist, Dr. James Maiers; Christopher's gastroenterologist, Dr. Richard Grand, and Christopher's pediatrician, Dr. Patricia Adams. The testimony of those professionals was to the effect that Christopher's emotional stability had a direct effect on his physical well-being, and the stress involved in the possible reintroduction of his biological mother to Christopher could threaten his very life. Furthermore, at the time of the termination hearing, it was anticipated that Christopher would soon undergo a liver transplant, and that his emotional stability could determine the success or failure of the surgery. *Id.* at 799. Under these circumstances, the Maine Supreme Court found that the trial court was justified in its determination that the fragile and serious nature of Christopher's medical condition created a situation such that Sybil would

simply be unable to accept responsibility for Christopher or protect him from jeopardy within a time reasonably calculated to meet his needs, and that the statutory test for termination of parental rights under Maine law had therefore been met, 22 M.R.S.A. § 4055(1)(B)(2). *In Re: Christopher J.*, 505 A.2d at 797.

In her appeal below, Petitioner claimed that the Department had failed to present sufficient evidence to support that finding. Petitioner did not present a constitutional claim in the State court proceedings before the Maine Supreme Court. The Maine Supreme Court upheld the trial court's findings of fact and affirmed the termination of her parental rights. This Petition followed.

———o———

ARGUMENT

I. THE PETITION SHOULD BE DISMISSED FOR FAILURE TO COMPLY WITH SUPREME COURT RULE 33.

When a Petition fails to comply with the form requirements set out in Supreme Court Rule 33, the Petition is returned by the Clerk to the Petitioner and may be corrected and resubmitted to the Clerk "provided that new and proper copies are *promptly* substituted" (emphasis added) Sup.Ct.R. 33.7. The Court may impose sanctions on a Petitioner who fails to comply with any provision of Rule 33, which sanctions may include dismissal of the action. In this case, Petitioner's lengthy delay in substituting a corrected Petition constitutes a clear violation of Rule 33.7, and the only appropriate sanction for such a serious violation is dismissal of the Petition.

The original Petition in this matter, filed on or about June 5, 1986, was immediately returned to the Petitioner's attorney because the Petition had not been printed in compliance with Rule 33.1.[2] The corrected Petitions were not substituted until on or about December 15, 1986, fully *six months* after the original filing. It is simply not possible to consider a six month delay to be a *prompt* substitution of the Petition. Indeed, in several cases, the Court has suggested that three (3) weeks constitutes the outside limit for such a substitution. In *Huffman v. Pursue, Ltd.*, 419 U.S. 892 (1974), where the Appellant's brief failed to comply with conciseness and printing requirements, the Court struck Appellant's brief, but allowed Appellant twenty (20) days within which to substitute a brief in compliance with the rules. Similarly, in *Snider, et al. v. All State Administrators,* 414 U.S. 685 (1974), the Court, having denied a Petitioner's request to dispense with printing requirements, allowed the Petitioner twenty-one (21) days to file a conforming Petition. These cases not only provide warning to counsel that the Court takes filing requirements seriously, they further provide clear notice of the Court's view of "prompt" substitution of filings.

Under the circumstances of the case at bar, the only appropriate sanction for a six-month delay in substituting corrected documents is dismissal of the Petition. The time requirements set out in the Court's rules are established to provide certainty in determining the finality of judg-

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2. The original petition, required to be filed within 90 days of the Maine Supreme Court's March 14, 1986 denial of the Petitioner's request for rehearing, was timely filed.

ments and to preserve the integrity of the judicial system.[3] In a matter such as this, the Petitioner's failure to substitute *promptly* constitutes a unilateral extension that entirely defeats the purpose of these rules and creates needless uncertainty as to the finality of a decision of the State's highest court.

Petitioner's six month delay is particularly egregious here. The stability and well-being of a physically and emotionally vulnerable child lie at the heart of this case. Following the denial of Petitioner's request to the Maine Supreme Court for rehearing on this matter, Christopher was adopted by his foster family, and thereby finally given the permanence that, as the decision of the Maine Supreme Court made eloquently clear, was of paramount importance for the boy. Petitioner's actions in this matter place the finality of that adoption in question and have the ultimate effect of keeping this child's life on hold while creating continuing uncertainty as to his future. Seen in this context, the only appropriate sanction for Petitioner's

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3. As this Court has emphasized in other contexts, the "uncertainties inherent in litigation should not be needlessly prolonged." *Commissioner v. Bedford's Estate*, 325 U.S. 283, 288 (1945). In *Bedford's Estate*, the Court, called on to decide whether the time for filing a Petition for Writ of Certiorari in certain circumstances ran from the date of the lower Court's "Order For Mandate" or the date of a later, more formal document entitled "Opinion," determined that time should begin running at the *earliest* pronouncement of the judgment being rendered.

lengthy delay in substituting corrected documents should be a complete dismissal of the Petition.

II. REASONS FOR DENYING WRIT

If the Court decides not to dismiss the Petition, it should nonetheless deny it for two independent reasons. First, Petitioner failed to raise in the State courts the constitutional issues she seeks to have reviewed here. That failure is made apparent by review of Petitioner's brief to the Supreme Court, that Court's opinion, and indeed her own Petition for Writ of Certiorari. Her failure to raise the constitutional claim below requires, under 28 U.S.C. § 1257(3), and, *e.g., Webb v. Webb,* 451 U.S. 493 (1981), therefore, that her Petition be denied. Second, the Petition does not demonstrate any reason for this Court to grant certiorari. There is no conflict among the courts with respect to this issue and the case presents no substantial federal question. Moreover, this Petition arises from a factual pattern so unique that the Court should refuse to exercise its discretion to grant certiorari.

A. PETITIONER'S FAILURE TO RAISE HER CONSTITUTIONAL CHALLENGE BELOW PRECLUDES GRANT OF REVIEW HERE.

The proceedings below and the Petition for Writ of Certiorari demonstrate that Petitioner failed to raise in the state courts any constitutional challenge to the Maine termination statute below. In her brief to the Maine Supreme Court, Petitioner characterized the issues

as being essentially evidentiary.[4] The Table of Authorities contained in Petitioner's brief to the Supreme Court[5] and the full text of that brief reveal that nowhere therein did Petitioner cite to the Fourteenth Amendment of the United States Constitution, nor to any other United States constitutional provision. Furthermore, the language of Chief Justice McKusick's decision makes it abundantly clear that Petitioner failed to present the constitutional challenge below, and that the Maine Supreme Court reviewed the Trial Court's decision solely for the sufficiency of the evidence.[6] Finally, required by

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4. Relevant portions of Petitioner's Brief to the Maine Supreme Court are reprinted herein, without the attachments. Appendix at p. 1. (Hereinafter App. 1). Petitioner therein stated the issues presented as follows:

STATEMENT OF ISSUE AND ARGUMENT

ISSUE: Did the District Court erroneously terminate the Appellants parental rights?

ARGUMENT I: The provisions of Title 22 M.R.S.A. § 4055(3) are jurisdictional and the state failed to meet the burden of this jurisdictional requirement.

ARGUMENT II: The findings of the District Court were not rationally supported by clear and convincing evidence and the order of termination is clearly erroneous. App. 5.

Argument 1 of Petitioner's Brief below addresses a statutory provision which establishes that "the court shall not order termination if the child is at least 14 years old and objects to the termination." 22 M.R.S.A. § 4055(3). The trial court found that the child did not object, and the Maine Supreme Court affirmed that finding. That argument is not relevant to the question Petitioner now presents to this Court.

5. App. 3.

6. Writing for the five member majority, Chief Justice McKusick set out the issues on appeal as follows:

The District Court found that Sybil is *unable to protect Christopher from jeopardy* and that the circumstances are unlikely to change within a time that is reasonably cal-

(Continued on following page)

Supreme Court Rule 21.1(h) to specify within her Petition for Writ of Certiorari the time and manner in which she raised her federal question below, Petitioner is forced to concede that the issue formulated on appeal to the Maine Supreme Court was that "The findings of the District Court were not rationally supported by clear and convincing evidence and the order of termination is clearly erroneous." (Petition at p. 8).

Under these circumstances, this Court's decisions require that the Petition be denied. The Court has repeatedly held that it is without jurisdiction to review federal questions not raised below, *Webb v. Webb,* 451 U.S. at 495, and has "refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Tacon v. Arizona,* 410 U.S. 351, 352 (1973), *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969). As the Court emphasized in *Webb,*

> there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reason-

---

(Continued from previous page)

culated to meet his needs and also that she is *unable to take responsibility* for Christopher within a time that is reasonably calculated to meet his needs. The District Court also found it to be in the best interests of Christopher that Sybil's parental rights be terminated. Sybil argues that those findings are not supported by clear and convincing evidence and that they are clearly erroneous. . . . After careful review, we hold that the record before the District Court did indeed contain the clear and convincing evidence required to support its findings of fact. (emphasis in original)

In Re: Christopher J., 505 A.2d at 797.

> ably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

Webb v. Webb, 451 U.S. at 499.

B. PETITIONER HAS FAILED TO ESTABLISH ANY GROUND FOR REVIEW BY THIS COURT.

Independently, this Court ought not to grant the Petition for Writ of Certiorari because Petitioner has failed to present any reason for so doing. There exists no conflict among either the Circuit Courts of Appeal or among any State Courts as to any issue raised in this case, there was no error below, and no important federal question has been presented. Moreover, the unusual facts of this case make it totally inappropriate for certiorari.

While this case certainly exemplifies the Solomon-like decisions facing trial courts in family matters, a review of the State's termination statute and the procedure below demonstrates that no error occurred. Maine's Termination of Parental Rights law requires that the trial court make two findings prior to terminating parental rights: first, that termination would be in the best interests of the child, and second, as relevant here, that,

> Either:
>
> (i) The parent is unwilling or unable to protect the child from jeopardy and these circumstances are unlikely to change within a time which is reasonably calculated to meet the child's needs;
>
> (ii) The parent has been unwilling or unable to take responsibility for the child within a time which is rea-

> sonably calculated to meet the child's needs; . . . . [or]
>
> (iv) The parent has failed to make a good faith effort to rehabilitate and reunify with the child pursuant to section 4041.

22 M.R.S.A. § 4055(1)(B)(2)(b). Each of these findings must be supported by clear and convincing evidence. 22 M.R.S.A. § 4055(1)(B)(2). On appeal, the Maine Supreme Court reviewed those statutory standards, *In Re: Christoher J.*, 505 A.2d at 797, and specifically referred to *Santosky v. Kramer*, 455 U.S. 745 (1982), in noting that "due process requires proof by clear and convincing evidence before parental rights may be terminated". *In re: Christopher J.*, 505 A.2d 797. The Court then reviewed the complex set of facts presented in this case and concluded that, "after careful review, we hold that the record before the District Court did indeed contain the clear and convincing evidence required to support its findings of fact." *Id.* Hence, the Court below carefully observed the due process safeguards announced in *Santosky* and properly applied the state statute to the unusual facts of this case.

Because Petitioner received the requisite procedural due process, no substantial federal question has been presented. This Court will exercise its discretion to grant certiorari in a case arising out of the State courts only where "a State court . . . has decided an *important question of federal law* which has not been, but should be, settled by this Court . . .". (emphasis added). Sup.Ct.R. 17.1(c). In order to present to this Court an important federal question arising out of a state's treatment of family law issues, a petitioner must do more than simply challenge the state's procedures. *Lassiter v. Department*

of Social Services, 452 U.S. 18 (1981). The Court's historical deference to each state's family law procedures, *see, e.g., U.S. v. Yazzell,* 382 U.S. 341 (1966), should be overcome only where a petitioner can demonstrate a clear constitutional violation, such as that demonstrated in *Santosky.*

In the case at bar, the State's statutory scheme not only complies with the standard of proof required by this Court in *Santosky,* but also satisfies the Court's concern that parental rights may not be terminated simply on the basis of the best interest of the child.[7] As amply set out above, the Court below found Petitioner unable to protect the child from jeopardy, unable to take responsibility for the child, and also found that those circumstances are unlikely to change within a time reasonably calculated to meet Christopher's needs. Neither *Santosky* nor the due process clause of the Fourteenth Amendment requires more.

Finally, the extremely unusual circumstances presented in this case argue against the granting of certiorari. Christopher was born with an extremely rare and usually fatal liver disease. Physicians working with Christopher during his infancy did not expect him to live to reach school age. *In Re: Christopher J.,* 505 A.2d at 796; P., 5. Petitioner Coombs relinquished Christopher to the Department of Human Services in the early seventies, at a time when subsidized adoptions of special needs children were unavailable. After relinquishing her rights to Christopher, Sybil's mother told her the boy had died. *Id.* Due to

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7. *See Santosky v. Kramer,* 455 U.S. at 761, n. 10.

advances in medical technology as well as the consistent and nurturing care provided to Christopher by one stable foster home, he has lived much longer than expected, has successfully undergone a liver transplant,[8] and has established a close and primary relationship with his foster mother. At the time of the hearing below, he had lived his entire *fourteen years* with that foster mother.

The facts presented in this case are very unlikely to recur and are not readily analogized to other termination cases. A decision addressing the parental unfitness issue made in the context of this factual situation would be of little assistance to state courts struggling with current cases regarding termination of parental rights.

———o———

8. The liver transplant had not occurred at the time of the trial, but the Maine Supreme Court noted that it had been successfully accomplished on December 11, 1985 during the pendency of the appeal below, *In Re: Christopher J.*, 505 A.2d at 796, n. 1.

CONCLUSION

For the reasons discussed above, the Respondent respectfully requests that the Petition for Writ of Certiorari be dismissed or in the alternative denied.

Respectfully submitted,

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Dated: February 12, 1987

APPENDIX

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO. YOR-85-410

IN RE: CHRISTOPHER J.

ON APPEAL FROM THE
MAINE TENTH DISTRICT COURT
DIVISION OF EASTERN YORK

BRIEF OF APPELLANT

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STATEMENT OF ISSUE AND ARGUMENTS

ISSUE: DID THE DISTRICT COURT ERRONEOUSLY TERMINATE THE APPELLANT'S PARENTAL RIGHTS?

ARGUMENT I: THE PROVISIONS OF TITLE 22 M.R.S.A. § 4055(3) ARE JURISDICTIONAL AND THE STATE FAILED TO MEET THE BURDEN OF THIS JURISDICTIONAL REQUIREMENT.

ARGUMENT II: THE FINDINGS OF THE DISTRICT COURT WERE NOT RATIONALLY SUPPORTED BY CLEAR AND CONVINCING EVIDENCE, AND THE ORDER OF TERMINATION IS CLEARLY ERRONEOUS.

ARGUMENT II: THE FINDINGS OF THE DISTRICT COURT WERE NOT RATIONALLY SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND THE ORDER OF TERMINATION IS CLEARLY ERRONEOUS.

Title 22 M.R.S.A. § 4055 (B. p.35) requires a two prong test by the District Court in terminating parental rights when there is no parental consent to such a termination. The Court must find that the termination is in the best interests of the child, and then the Court must find that the unconsenting parent is unable or unwilling to protect the child from jeopardy, or take responsibility for the child *in a time reasonable calculated* to meet his or her needs. (Emphasis added). Further, the burden of proof is on the proponent of termination, in this case the State, by clear and convincing evidence. *In re Sabrina M. et. al.*, 406 A. 2d 1009 (Me. 1983).

Based on the uncontroverted evidence at hearing of this particular child's unique physical and emotional condition pending a then imminent liver transplant the District Court found "that it is in the best interests of Christopher Paul J. that the parental rights of his biological mother . . . be terminated". (A. p.47). The Court continued to find that the natural mother was *not* unwilling to protect the child or take responsibility for the child, "but rather that she is unable to do so given the circumstances of Christopher Paul J." When the result of this decision imposes the severest civil penalty, that of terminating a parent's rights and foreclosing the future possibility of any legal rights between a mother and

child the Law Court must apply a high standard of review. This Court has done so in many other cases, but has rarely been called upon to deal with a case such as this that would require them to agonize as King Solomon must have prior to rendering his decision. *Danforth v. State Department of Health and Welfare,* 303 A. 2d 794 (Me. 1973); *Meyer V. Nebraska,* 262 U.S. 390 (1922); *Pierce v. Society of Sisters,* 268 U.S. 510 (1924); *Stanley v. Illinois,* 405 U.S. 645 (1972); and *Santosky II v. Kramer,* 455 U.S. 745.

There is no factual dispute that this child has been severely and chronically ill since birth; there is no factual dispute that the natural mother, at 15 years old, made a decision with her family to give her unborn child up for adoption and entered the St. Andre's Home for that purpose; there is no factual dispute that, at 15 years old she consented to State custody so that the child could be treated and adopted when St. Andre's refused to place him; there is no factual dispute that this natural mother had no direct contact with the Department from September of 1971 until the Spring of 1983; there is no factual dispute that this natural mother reasonably believed this child to have died in January of 1973; and there is no factual dispute that the Department did not contact the family at all between January of 1973 and the Spring of 1983; and there is no factual dispute that at least one employee of the Department knew in 1978 that the natural mother believed the child to be dead.

There is no factual dispute that the foster mother has been a loving and caring and responsible parent to this child almost since his birth, or that he considers her his psychological parent. But the District Court specifically found that "the biological mother. . . . . would be a loving caring mother as the foster mother. . . . has been for the past 14 years." This is not a case where this Court can somehow measure the extent of parental misconduct in determining whether the State has met it's burden. Nor is this a case, given the child's physical condition, where this Court can only look at the extent of the State's gross negligence, as shocking as it is.

The State, as it's Petition for Termination alleges (A. p. 17), would have this Court find that the natural mother, at 15, 16 and 17 years old, refused to assume responsibility for this child (or convince her parents to do so), refused to visit with the child, and that somehow, although she believed him dead, should have sought some official confirmation. They would have this Court find that given the circumstances between the fall of 1971 and the winter of 1973 all lack of compliance by the Department for ten years becomes immaterial or irrelevant. The facts adduced at trial, and the findings of the District Court, controvert the picture painted by the State in it's Petition and Closing Arguments. The judge had the opportunity to judge the demeanor of the mother and grandmother, as well as the Department workers who testified, and found a loving caring woman who wants to care for, or help care for her child.

There can be no question that had this child been physically normal a reintroduction to his natural mother

would have occurred in 1983. Given the facts and circumstances it would seem that the issue is the meaning of "a time reasonably calculated to meet Christopher's needs" in the context of this case. It is here that the Court must consider the State's efforts, "or lack thereof as a factor to be considered in evaluating the parents' conduct". *In Re Crystal S.*, 438 A. 2d 1210 (Me. 1984).

No one can undo the fact that Christopher remains unadopted at age 14 years old whether it is because there was insufficient subsidy money within the State until 1983, or whether because his natural mother refused to consent after 1983. Any phychological damage incurred from remaining in foster case long term would have been done by 1983, and the adoption laws in this State contemplate that a 14 year old would know all the facts relating to his background prior to consenting to the adoption. The thrust of the State's evidence at hearing, and the thrust of the decision of the Court in determining that the mother would be unable to care for him given his circumstances, clearly related to the pending liver transplant. This transplant has been accomplished and only time will tell the impact on the health of this child, and his ability to absorb and deal with his family history.

The law must provide, in these unique circumstances, an equitable means to fashion alternative plans which would allow for the best for both mothers and the child; and which would allow for an alternative when neither adoption or termination are appropriate, as in the case of an older child, so that the foster home could continue but the child could be reintroduced to and establish some bond with his natural family. What the State has failed to consider is that Chris-

topher not only has a real mother, but a real brother and sister. *In Re Kenneth,* 439 A. 2d 1366 (R.I., 1982); *In Re LaFreniere,* 420 A.2d 82 (R.I., 1980); *In the Matter of Custody and Guardianship of Dana Marie E.,* 492 N.Y.S. 2d 340 (1985); *N.J. Division of Youth and Family Services v. Huggins,* 118 N.J. Super. 88, 371 A. 2d 841 (1977).

Given the behavior of the Department and the age of the child, a period reasonably calculated to meet the child's needs, in these circumstances, cannot commence until the child knows and meets his mother. The impending liver transplant was a factor which the Court used as a cut off time for the reasonable period based on some perception that the transplant team might take the child off the list if there were no termination order. This impression was given at the hearing. However, this does not rise to a legal standard, and has been shown to be erroneous by the fact that the transplant occurred without the termination or adoption.

The relevant case law balances the behavior of the parent; the efforts of the State and the best interests of the child in determining the desirability of termination. The State must make some effort when the child has sufficiently recovered to introduce this mother to Christopher; the mother is willing to meet and care for the child without disrupting his love for his foster mother, and this child has the right to know his mother, brother and sister exist prior to any termination or subsequent adoption.

CONCLUSION

At the very least the requirements of Title 22 M.R.S.A. 4055 (e) require that the evidence presented at a termination hearing by the proponent show, by clear and convincing evidence that the child, if 14 years old, does not object to the termination of his or her parents rights. At the very least, if the is implied by the evidence, there must be a clear and convincing showing that the child knows that his parent opposes the termination and that the child has knowledge of the proceeding. The burden of making this showing lies upon the proponent of termination. This requirement is jurisdictional and the merits of the case of the proponent are meaningless without the meeting of this threshold burden.

In determining a standard for "a time reasonably calculated to meet the needs of the child" the Court must balance the willingness, abilities and conduct of the parent; the activities of the State and the best interests of the child. The reasonableness of the time cannot be determined by one event, no matter how grave, taken out of the context of the entire history of the situation before the court. In this case it is impossible to begin to calculate a reasonable time prior to a reintroduction of this natural mother with her child. Given the circumstances even if this were to take another year that would not be unreasonable. The desires of the transplant team, and the pain of the foster mother,

while real and sympathetic cannot override the parental bond of mother and child.

Dated: December 13, 1985

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I made service of the within Brief and Appendix upon the Petitioner/Appellee State of Maine by hand delivering two copies of said Brief and Appendix to counsel for said Petitioner/Appellee.

Dated: December 13, 1985

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